

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-1195

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1195

DELTA DATA SYSTEMS CORPORATION,

Appellee,

—against—

GRAPHIC SCANNING CORP.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

BELL, WOLKOWITZ, BECKMAN & KLEE

Attorneys for Appellant

501 Madison Avenue

New York, New York 10022

MELVIN D. KRAFT

Attorney for Appellee

36 West 44th Street

New York, New York 10036



PAGINATION AS IN ORIGINAL CCPY

INDEX

	<u>Page</u>
Docket Entries	1
Judgment	3
Complaint	4
Exhibit A to Complaint	6
Answer and Counterclaims	8
Exhibit A to Answer and Counterclaims	13
Request of Delta Data for Production of Documents	14
Request of Graphic Scanning for Production of Documents	17
Request of Delta Data for Discovery and Inspection	20
Delta Data's Interrogatories	22
Delta Data's Notice of Motion for Discovery and Inspection	29
Affidavit of Melvin D. Kraft in Support	31
Exhibit A to Affidavit of Melvin D. Kraft Omitted (Answer and Counterclaims) . .	36
Exhibit B to Affidavit of Melvin D. Kraft Omitted (Request for Discovery and Inspection)	37
Exhibit C to Affidavit of Melvin D. Kraft . . .	38
Exhibit D to Affidavit of Melvin D. Kraft . . .	42
Memo Endorsed 10/24/73	45
Answers to Interrogatories	46
Verification of Barry Yampol	50
Stipulation dated November 16, 1973	51
Deposition of Graphic Scanning by Barry Yampol Page 250	52

INDEX

	<u>Page</u>
Notice to Take Deposition of Delta Data	53
Schedule A to Notice to Take Deposition of Delta Data	54
Graphic Scanning's Second Request for Production of Documents	55
Deposition to be Taken of Graphic Scanning by Ed Fenning, Page 3	57
Transcript of Proceedings 11/20/73	58
Notice of Motion to Vacate Sanction and Compel Discovery	75
Affidavit of Barry Wolkowitz in Support	77
Affidavit of Barry Yampol in Support	81
Affidavit of Melvin D. Kraft in Opposition	83
Exhibit A to Affidavit of Melvin D. Kraft	89
Exhibit C-1 to Affidavit of Melvin D. Kraft in Opposition	90
Exhibit C-2 to Affidavit of Melvin D. Kraft in Opposition	92
Exhibit C-3 to Affidavit of Melvin D. Kraft in Opposition	94
Memo Endorsed 11/29/73	95
Graphic Scanning's Further Answers to Interrogatories	96
Verification of Barry Yampol	98
<u>STENOGRAPHER'S MINUTES OF TRIAL:</u>	
[28] Kaelin-Direct-Cross	99
[57] Kaelin-Cross	100
[58] Kaelin-Cross	101

INDEX

	<u>Page</u>
[77] Kaelin-Direct	102
[133] Borden-Direct	103
[134] Borden-Direct	104
[161] McEntee-Direct	105
[162] McEntee-Direct	106
[168] McEntee-Direct	107
[179] McEntee-Direct	108
[265] Wynne-Cross	109
[266] Wynne-Cross	110
[267] Wynne-Cross	111
[268] Wynne-Cross	112
[276] Wynne-Cross	113
[308] Fenning-Direct	114
[349] McEntee-Direct	115
[350] McEntee-Direct	116
[373] McEntee-Cross	117
[381] Mattson	118
[408] Summation of Delta Data	119
[423] Summation of Delta Data	120
[423a] Summation of Delta Data	121
[428] Charge	122
[442] Charge	123
Plaintiff's Exhibit 1--Purchase Order dated 3/27/72	124

INDEX

	<u>Page</u>
Plaintiff's Exhibit 5--Statement dated August 1, 1972 to Graphic Scanning	125
Plaintiff's Exhibit 6--Check of Graphic Scanning dated August 18, 1972	126
Plaintiff's Exhibit 8--Statement to Graphic Scanning dated November 21, 1972 .	127
Plaintiff's Exhibit 11--Statement from Delta Data to Barry Yampol dated September 26, 1972	129
Plaintiff's Exhibit 12--Letter from Delta Data to Barry Yampol dated October 17, 1972	130
Plaintiff's Exhibit 14--Customer Equipment Acceptance dated 8/28/72	131
Plaintiff's Exhibit 20--Components of Graphic's Replacement System	132
Defendant's Exhibit K--Letter from Graphic Scanning to Barry Borden dated July 18, 1972	133
Index to the Record on Appeal	134
Index to Supplemental Record on Appeal	135

ata Systems vs. Graphic Scanning Corp.

DOCKET ENTRIES

		DOCKET ENTRIES	Date Order or Judgment Noted
Mar. 15-73	Filed Complaint issued summons.		
Apr. 4-73	Filed summons with marshals Ret.served 6.Ratch 3-21-73.		
Apr. 4-73	Filed Stip and order extending time to answer until 4/20/73.		
Apr. 20-73	POLLACK, J.		
Apr. 20-73	Filed ANSWER and Counterclaims to comp.		
May 2-73	Filed pltff.demand for jury trial.		
May 14-73	Filed Stip and order that time of pltff. to serve a reply to counterclaim is extended until 5/23/73.	POLLACK, J.	WEB
May 18-73	Filed pltff. request for production of documents.		
Sep. 7-73	Filed Pltff's Request for Discovery and inspection.		
Sep. 7-73	Filed Pltff's Interrogs.		
Sep. 26-73	Filed Plaintiff's Affdvt&Notice of Motion for an order requiring deft. Graphic Scanning Corp to permit pltff to inspect,etc.as ind. ret. 10/5/73, 2:15 P.M.		
Sep. 26-73	Filed Pltff's Memorandum of Law in support of Motion.		
Sep. 26-73	Filed pltff's notice to take deposition of T.Wynne, on 10-4-73.		
Oct. 25-73	Filed MEMO-END. on motion dtd 9-26-73 This case is set for trial for 12-3-73 at 10AM. Proposed agreed and disputed findings to be filed by 11-26-73. The motion to inspect equipment is granted as follows: (1)pltff may inspect the equipment sold by it to the deft. (2) Pltff may also inspect the replacement equipment (display device) in a room other than that in which deft's other equipment is located and deft shall furnish to pltff an identification in recognizable detail of the components of the replacement equipment. etc.	Pollack, J.	
Sep. 24-73	Pre-trial before Pollack, J.		
Oct. 1-73	Pre-trial before Pollack, J.		
Oct. 24-73	Pre-trial before Pollack, J.		
Nov. 6-73	Pre-trial before Pollack, J.		
Nov. 19-73	Filed Stip/Order that the deft withdraw so much of its counterclaim contained in paragraphs numbered 18 & 19 of its answer as claims damages for loss of customers and loss of profits, leaving only its claim for damages to its reputation. and pltff agrees to withdraw so much of its interrogs. as relates to the above counterclaim, items 1 thru 7 and 15 thru 22 in its request for interrogs. dtd 9-5-73. Pollack, J.		
Nov. 20-73	Filed deft's notice of appearance and change of address of atty.		
Nov. 19-73	Pre-trial before Pollack, J.		
Nov. 20-73	Pre-trial before Pollack, J.		
Nov. 30-73	Filed pltff's reply to the counterclaims of deft dtd 4-19-73.		
Dec. 3-73	Jury trial begun before Judge Pollack.		
Dec. 4-73	Trial cont'd.		
Dec. 5-73	Trial cont'd and concluded. Pollack, J.		
Dec. 6-73	Filed JUDGMENT #73,963. Ordered that pltff Delta Data Systems Corp have judgment against the deft Graphic Scanning Corp in the amount of \$34,215.81 with interest, of \$2,332.50 to date of judgment with costs to be taxed. Clerk Pollack, J.		
Dec. 12-73	Filed Bill of costs in the sum of \$1,833.05. Judgment #73,963		
Dec. 14-73	Filed Supersedeas Bond in the sum of \$40,885.32 by Fidelity and Deposit Co of Maryland.		

-cont'd on next page-

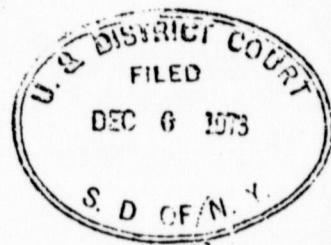
DOCKET ENTRIES

DELTA DATA SYSTEMS -v- GRAPHIC SCANNING CORP. vs Green, Etc.

JULY 1974

D.C. 1974-24 Civil Docket Continuation

DATE	PROCEEDINGS
Jan 4-74	Filed deft's notice of appeal from order dtd 11-20-73. Mailed copy to Green, Scherpless & Greenstein.
Feb. 29-73*	Filed Notice of motion pursuant to Rule 60(b) F.R.C.P. for an order relieving the deft from the final judgment order, and Rule 37(a) compelling the plaintiff to appear at the offices of the deft; memo. endorsed-Pollack J.
Nov. 29-73*	Filed Affidavit in Opposition by plaintiff.
Feb 21/74	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A.
Mar 4/74/73	PRE-TRIAL CONFERENCE HELD BY Pollack, J
4/29/74	Filed deposition of Graphic Scanning Corp by Ed Fenning dtd 11/20/73.
4/29/74	Filed deposition of Graphic Scanning Corp by Barry Yampol dtd 8/28/73.
5-1-74	Filed stipulation transmitting certain documents that have been file stamped by agreement to the U.S.C.A.
5-1-74	Filed deft's answers to interrogatories (agreed by parties to be entered on docket sheet).
5-1-74	Filed deft's notice to take deposition (agreed by parties to be entered on docket sheet).
5-1-74	Filed deft's second request for production of documents (agreed by parties to be entered on docket sheet).
5-1-74	Filed deft's further answers to interrogatories (agreed by parties to be entered on the docket sheet).
5-1-74	Filed transcript of record of proceedings dtd: Dec. 3-5-73.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 DELTA DATA SYSTEMS CORPORATION, : 73 Civil 1110(MP)
 Plaintiff, : JUDGMENT
 -against- : # 73,933
 GRAPHIC SCANNING CORPORATION, :
 Defendant. ----- X

The issues in the above entitled action having been brought on regularly for trial before the Honorable Milton Pollack, United States District Judge, and a jury on December 3, 4 and 5, 1973, and the jury having returned a verdict in favor of the plaintiff, and the Court having denied the motion of the defendant to set aside the verdict, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, DELTA DATA SYSTEMS CORPORATION, have judgment against the defendant, GRAPHIC SCANNING CORPORATION, in the amount of \$34,275.81 with interest, of \$2,332.59., to date of judgment, with costs to be taxed.

Dated: New York, N. Y.

December 6, 1973

REMICROFILE

DEC 6 1973
12/30/73

Raymond F. Burghardt
Clerk

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Delta Data Systems Corporation,
Plaintiff

v.

Civil Action No.
Complaint

Graphic Scanning Corp.,
Defendant

- 113 Broadway - 24 - - - - -

FIRST COUNT:

1. Plaintiff is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and has its principal place of business in the Commonwealth of Pennsylvania. Defendant is a corporation incorporated under the laws of the State of Delaware and has its principal place of business in a state other than the Commonwealth of Pennsylvania. The matter in controversy exceeds, exclusive of interests and costs, the sum of ten thousand dollars.
2. Plaintiff sold to Defendant certain goods at an agreed price and reasonable value of \$35,193.81 of which \$923 has been paid, leaving a balance of \$34,275.81.

SECOND COUNT:

3. Plaintiff repeats and realleges the allegations contained in paragraphs 1 and 2.
4. Defendant owes Plaintiff the sum of \$34,275.81 according to the account stated as annexed hereto as Exhibit A.

COMPLAINT

WHEREFORE, Plaintiff demands judgment in the sum of \$34,273.81 with interest from May 15, 1972 and the costs and disbursements of this action.

Dated: March 13, 1973

GREEN, SHARPLESS & GREENSTEIN

By Kenneth I. Greenstein
A Partner
Attorneys for Plaintiff
One Rockefeller Plaza
New York, New York 10020

EXHIBIT A TO COMPLAINT
STATEMENT



**Delta
Data
Systems
Corporation**

BOX 298
CORNWELLS HEIGHTS, PA. 19020

DATE November 21, 1972

10. Graphic Scanning Corporation
11 Broadway
New York, New York 10004

Current Statement of Account

INVOICE NUMBER	DATE	CUSTOMERS PURCHASE ORDER NUMBER	AMOUNT
460-1	5-15-72	Balance on Invoice	\$ 3,567.00
426-2	5-18-72		4,230.00
426-3	5-26-72		2,450.00
545-1	6-23-72		13,725.00
549-1	7-30-72		4,575.00
567-1	9-19-72		4,575.00
50600-1	10-17-72		. 105.00
PAST DUE AMOUNTS		30-60	60-90
		90-OVER	CURRENT
			TOTAL BALANCE DUE

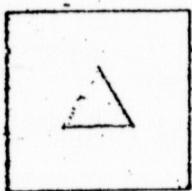
PLEASE REMIT TO:

BOX 293, CORNWELLS HEIGHTS, PENNA. 19020

TERMS ARE 2/10 - 10, Net 30. 1 1/2% per month interest will be added to all overdue accounts.

EXHIBIT A TO COMPLAINT

STATEMENT



Delta
Data
Systems
Corporation

BOX 298
CORNWELLS HEIGHTS, PA. 19020

DATE November 21, 1972

TO: Graphic Scanning Corporation
11 Broadway
New York, New York 10004

INVOICE NUMBER	DATE	CUSTOMERS PURCHASE ORDER NUMBER			AMOUNT
50601-1	10-17-72				\$ 130.00
50603-1	10-17-72				205.00
50608-1	10-17-72				355.32
50614-1	10-17-72				358.49
PAST DUE AMOUNTS		30-60	60-90	90-OVER	TOTAL BALANCE DUE
		4,575.00		28,547.00	\$ 34,275.81
				1,153.81	

PLEASE REMIT TO:
BOX 298, CORNWELLS HEIGHTS, PENNA. 19020

TERMS ARE 2% - 10, Net 30. 15% per month interest will be added to
all overdue accounts.

ANSWER AND COUNTERCLAIMS

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Delta Data Systems Corporation

Plaintiff,

vs.

#73 Civ 1110
Answer & Counterclaims

Graphic Scanning Corp.

Defendant.

The defendant, Graphic Scanning Corp., as and for its answer to the complaint alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 except admits that the defendant is a corporation existing and doing business by virtue of the laws of the State of Delaware.
2. The defendant denies each and every allegation contained in paragraphs 2 and 4 of the complaint except admits that the sum of \$923 was paid by the defendant to the plaintiff.

**AS AND FOR AN AFFIRMATIVE
DEFENSE AND COUNTERCLAIM**

3. Plaintiff has admitted to being a corporation incorporated under the laws of the Commonwealth of Pennsylvania and has its principal place of business in the Commonwealth of Pennsylvania.
4. Defendant is a corporation incorporated under the laws of Delaware, authorized to do business in New York and engaged primarily in providing specialized data and information processing and delivery services to fulfill

ANSWER AND COUNTERCLAIMS

particular industry needs.

5. The amount in controversy, exclusive of costs and interest, exceeds \$ 10,000 .

6. In or about October, 1971, plaintiff commenced negotiations with defendant relating to a prospective offer to design, manufacture, install and service for defendant a data communications system to be used by defendant for the specified purpose of providing specialized communications services to the trucking industry.

7. The services to be provided by defendant included, among others, the high speed processing of applications for state trucking permits relating to overweight or overdimension trucks that must be sanctioned for travel over specific highways, and a service providing for the transfer of money to truck drivers located at specified truck stops around the country.

8. The equipment which comprised the proposed system was to include cathode ray tube display devices, line printers, high speed code conversion devices, communication interfaces, and high speed tape cassettes. The system was to be installed in the defendant's central computer facility located in New York City, and at the offices of various trucking companies who would at that time be customers of defendant for the specialized communications service and state permit agencies around the country.

9. Plaintiff's offer to design, manufacture, install and service the data communications system was made after numerous discussions between plaintiff's agents and defendant's agents in which defendant's agents fully described the object and purpose of the system and the services it would be able to provide to its prospective and present customers, and the immediate sales campaign it would embark upon to seek out new customers for the service, were it assured that such a system could be implemented and fully operational within a specified time period.

10
ANSWER AND COUNTERCLAIMS

10. Upon the express representations by plaintiff that plaintiff's system, which it would design, manufacture, install and service for defendant, would accomplish all of defendant's needs in providing the specialized services to the trucking industry, and that plaintiff could deliver and install a working system within the time frame required by defendant, on March 27, 1972 defendant ordered the system specifying that delivery would be required within 30 days. A copy of the purchase order is annexed hereto as Exhibit "A".
11. After placing the purchase order for the data communications system, defendant embarked on an extensive sales campaign in which it solicited prospective customers. Such solicitation methods included, among others, direct mail advertising and attendance at trucking association conventions and meetings.
12. Subsequent to March 27, 1972, plaintiff advised defendant that it was encountering various problems relating to the design and manufacture of the circuit boards and various other components of the system. After several unsuccessful attempts to install a working system, plaintiff finally installed a system which it purported to be operable on or about June 6, 1972, on defendant's premises.
13. In fact, the system did not operate from the very first day it was installed. Although plaintiff made sporadic attempts to repair the system, all attempts were unsuccessful and the system never operated as plaintiff represented it would. Defendant was never able to utilize the system to effectively service its customers in the trucking industry.
14. Plaintiff specifically warranted to defendant that the data communications system designed, manufactured and installed would accomplish the specific purposes for which defendant wished to utilize the said data communications system. Plaintiff further warranted that said data communications system would be merchantable, as more fully described in Section 2-314 of the Uniform Commercial Code of New York, and that said system would be fit for use for a particular purpose, as more fully described in Section 2-315

ANSWER AND COUNTERCLAIMS

of the Uniform Commercial Code of New York.

15. Plaintiff breached its contract with defendant by failing to make timely delivery and installation of the system.

16. Plaintiff further breached its contract with defendant by failing to provide an operating or usable system.

17. Plaintiff breached the aforesaid warrants made to defendant under the contract.

18. Defendant, relying on plaintiff's assurances, planned to have its trucking network operational no later than May 1, 1972, and had made representations to various trucking industry customers of such fact. Defendant lost more than 50 customers due to its failure to be able to perform as represented to its customers, thus permanently injuring defendant's reputation and credibility in the trucking industry. The loss to defendant due to injury to its reputation and loss of customers was \$180,000.

19. The loss of profits to defendant during the 40 day period of late delivery was \$30,000.

20. Defendant paid plaintiff the sum of \$25,000 on account by the said system and prior to the time which it became apparent that said system was not operable. Defendant also purchased peripheral equipment to be used in coordination with plaintiff's system which has no use to defendant and cost \$20,000. In addition, defendant incurred various other expenses due to the fact that plaintiff delivered the system late and the system never operated properly. Such expenses amounted to \$10,000.

WHEREFORE, the defendant requests that the Court grant:

- (a) A dismissal of plaintiff's complaint;
- (b) Awarding damages to defendant in its counterclaims in the sum of \$265,000.
- (c) Reasonable costs of suit; and

ANSWER AND COUNTERCLAIMS

(d) Such other and further relief as the court may deem just and proper.

Dated: April 19, 1973

WOLKOWITZ & BECKMAN
Attorneys for Defendant
14 East 60th Street
New York, New York 10022
(212) 838-2672

By

Michael Beckman, a member of
the firm

**EXHIBIT A TO ANSWER
AND COUNTERCLAIMS**

CHAMPS TRAINING CORP.
16 WEST 34th STREET
NEW YORK, N. Y. 10001
(212) 624-2239

10 WEST 24th STREET
NEW YORK, N. Y. 10001
(212) 524-2239

(212) 524-2239

DATE 3/27/72 DATE REQUIRED 3/26/72

NO. 11

DATE 3/27/22 DATE REQUIRED 3/26/22

SHIP VIA

F.O.B.

TERMS

TO: Delta Data Systems
Woodhaven Industrial Park
Cranberry Heights, Pa.

SHIP TO: *George Brown & Co.*
At: *F.O. C. C. Co.*
1 Broadway
New York, N.Y. 10004

DISPOSITION OF MATERIAL

RECEIVING CLERK

By Faculties of Co-operation

www.com-jones.com © 1991 © PRINTED IN U.S.A.

TRIPPLICATE

Exhibit "A"

REQUEST OF DELTA DATA FOR
PRODUCTION OF DOCUMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

REQUEST FOR
PRODUCTION
OF DOCUMENTS

-against-

GRAPHIC SCANNING CORPORATION,

73 Civ. 1110 M.P.

Defendant.

-----x
TO: WOLKOWITZ & BECKMAN
Attorneys for Defendant
14 East 60th Street
New York, New York 10022

S I R S :

TAKE NOTICE that the plaintiff, Delta Data Systems Corporation, pursuant to Rule 34 of the Federal Rules of Civil Procedure, requests defendant, Graphic Scanning Corporation, to produce and permit plaintiff to inspect and to copy each of the following documents:

1. The acknowledgement sent to defendant by plaintiff, Delta Data Systems Corporation, of defendant's order, dated March 27, 1972, marked Exhibit "A" and annexed to the counter-claim.

2. All invoices submitted by plaintiff to defendant after the date of the aforementioned purchase order, to wit, March 27, 1972.

REQUEST OF DELTA DATA FOR
PRODUCTION OF DOCUMENTS

3. All statements of account submitted by plaintiff to defendant after the date of said purchase order, March 27, 1972.

4. All correspondence between defendant and plaintiff, and between their attorneys, relating to the order of March 27 1972, and dated both prior to and subsequent to the said order.

5. All agreements between defendant and Deldaco Leasing Corporation and all correspondence relating thereto.

6. All letters, memoranda, telegrams, notes, and other writings between defendant and its trucking industry customers in 1971, 1972 and 1973, which relate to paragraphs numbered 11, 13 and 18 of defendant's counterclaim, including, but not limited to:

(a) all sales letters, direct mailings, brochures and other literature sent to such customers to solicit their business for the equipment ordered by defendant in its March 7 1972, purchase order;

(b) all writings between defendant and such customers in which defendant represented that its trucking communications network would be operational no later than May 1, 1972; and

(c) all writings relating to the loss of customers allegedly sustained by defendant as a result of the alleged failures of plaintiff to perform any of its obligations to defendant.

6. All other documents that are relevant to the subject matter of the action or are reasonably calculated to lead to discovery of admissible evidence within Rule 26 FRCP.

REQUEST OF DELTA DATA FOR
PRODUCTION OF DOCUMENTS

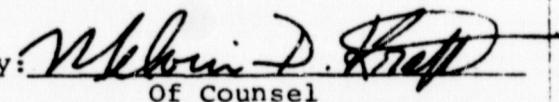
That defendant produce and permit plaintiff's attorneys to inspect and copy said documents at the offices of defendant's counsel, 14 East 60th Street, New York, New York, on May 18, 1973 at 2:00 P.M.

The term "document", as used hereinabove, shall include any written, recorded or graphic matter, or any other tangible thing pertaining to the subject matter of the request, whether originated or received by the defendant, and whether intra-corporate or otherwise. If any such document was, but is no longer, in the possession of the defendant, state what disposition was made of it, the date of such disposition and whether a copy thereof reposes in the possession or custody of any other person firm or corporation.

Each request for a document shall be deemed to call for the production of the original document to the extent that it is in or subject, directly or indirectly, to the control of the defendant. In addition, each request should be considered as including all copies and all preliminary drafts of documents which as to content, differ in any respect from the original or final draft, or from each other (e.g. by reason of handwritten notes or comments having been added to one copy of the document but not on the original or the copies thereof).

Dated: May 15, 1973.

GREEN, SHARPLESS & GREENSTEIN
Attorneys for plaintiff

By: 
Of Counsel

REQUEST OF GRAPHIC SCANNING FOR
PRODUCTION OF DOCUMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

-against-

GRAPHIC SCANNING CORP.

Request for
Production of
Documents

Defendant.

73 Civ. 1110 M.P.

-----x
TO: GREEN SHARPLESS & GREENSTEIN
Attorneys for Plaintiff
One Rockefeller Plaza
New York, New York 10022

Attention: Melvin D. Kraft, Counsel
36 West 44th Street
New York, New York 10036

S I R S :

TAKE NOTICE that the plaintiff, Graphic Scanning Corp., pursuant to Rule 34 of the Federal Rules of Civil Procedure, requests plaintiff, Delta Data Systems Corporation to produce and permit defendant to inspect and to copy each of the following documents:

1. All correspondence between plaintiff and defendant relating to proposals concerning the design or installation or maintenance of a communications system to be provided to defendant by plaintiff.
2. All specifications relating to the system provided by plaintiff to defendant.

18
REQUEST OF GRAPHIC SCANNING FOR
PRODUCTION OF DOCUMENTS

-2-

3. A list of the names of all employees of plaintiff who were involved in the design, installation or maintenance of the system provided by plaintiff to defendant.
4. All records, including but not limited to memorandums, logs, service reports, etc., of service provided by plaintiff to defendant in attempting to repair the system provided by plaintiff to defendant.
5. All intracompany communications concerning the design, installation or maintenance of the system provided by plaintiff to defendant, including without limitation notes, memoranda, summaries, minutes and records of telephone conversations, meetings and conferences; summaries and records of personal conversations or interviews; books, manuals, publications and diaries, laboratory and engineering reports and notebooks; charts, plans, sketches, drawings; reports and/or summaries of investigation.
6. All other documents that are relevant to the subject matter of the action or are reasonably calculated to lead to discovery of admissible evidence within Rule 26 FRCP.

That defendant produce and permit plaintiff's attorneys to inspect and copy said documents at the offices of plaintiff's counsel, 36 West 44th Street, New York, New York, on May 8, 1973, at 2:00 P.M.

The term "document", as used hereinabove, shall include any written, recorded or graphic matter, or any other tangible thing pertaining to the subject matter of the request, whether originated or received by the defendant, and whether intra-corporate or otherwise. If any such document was, but is no longer, in the possession of the defendant, state what disposition was made of it, the date of such disposition and whether a copy thereof reposes in the possession or custody of any other person, firm or corporation.

REQUEST OF GRAPHIC SCANNING FOR
PRODUCTION OF DOCUMENTS

-3-

Each request for a document shall be deemed to call for the production of the original document to the extent that it is in or subject, directly or indirectly, to the control of the defendant. In addition, each request should be considered as including all copies and all preliminary drafts of documents which as to content, differ in any respect from the original or final draft, or from each other (e.g. by reason of handwritten notes or comments having been added to one copy of the document but not on the original or of the copies thereof).

Dated: May 18, 1973

WOLKOWITZ & BECKMAN

Attorneys for Defendant

By

Barry H. Wolkowitz

Barry H. Wolkowitz

REQUEST OF DELTA DATA FOR
DISCOVERY AND INSPECTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

REQUEST FOR DISCOVERY
AND INSPECTION

-against-

Index No.
73 Civ. 1110 M.P.

GRAPHIC SCANNING CORPORATION,

Defendant.

-----x
S I R S :

PLEASE TAKE NOTICE that the plaintiff, Delta Data Systems Corporation, hereby requests, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendant, Graphic Scanning Corporation,

(1) permit plaintiff and its attorneys to inspect, examine, photograph and test the data communications equipment which plaintiff sold and shipped to defendant under the purchase order dated March 27, 1972, annexed to defendant's answer and counterclaims as Exhibit "A", as thereinafter modified, at No. 11 Broadway, New York, New York, and/or at any other premises of defendant, commencing on the 13th day of September, 1973, at 10:30 o'clock in the forenoon of that day, and thereafter, to the extent necessary; and

REQUEST OF DELTA DATA FOR
DISCOVERY AND INSPECTION

(2) permit plaintiff and its attorneys to inspect, examine, photograph and test the data processing and other equipment presently used by defendant for the purpose of providing specialized communications services to the trucking industry, which equipment is located in premises of defendant at No. 99 West Sheffield Avenue, Engelwood, New Jersey, and at any other premises of defendant, commencing on the 18th day of September, 1973, at 9:00 o'clock in the forenoon of that day, and thereafter, to the extent necessary.

Dated: September 6, 1973

GREEN, SHARPLESS & GREENSTEIN
Attorneys for Plaintiff

By: Melvin D. Kraft
MELVIN D. KRAFT
Of Counsel

TO: BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant
501 Madison Avenue
New York, New York 10022

DELTA DATA'S INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

INTERROGATORIES

-against-

73 Civ. 1110 M.P.

GRAPHIC SCANNING CORPORATION,

Defendant.

-----X

TO: BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant
501 Madison Avenue
New York, New York 10022

TAKE NOTICE that the plaintiff, Delta Data Systems Corporation, requests that defendant, Graphic Scanning Corporation, by an officer or agent thereof, answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories:

1. Please state the names and addresses of each of the "more than 50 customers" lost by defendant, as alleged in paragraph 18 of defendant's counterclaim.
2. Please state that portion of the \$180,000 alleged to have been lost by defendant, which is attributable to the loss of the aforesaid customers.
3. Please state the dollar amount claimed to have been lost by defendant as to each of the customers listed in defendant's answer to interrogatory number 1.

DELTA DATA'S INTERROGATORIES

4. As to each item in defendant's answer to interrogatory number 3, specify whether the dollar amount so claimed represents gross sales or revenues, or whether it represents net profits on such sales or revenues; if the answer is "net profits" please show the manner in which such figures were computed.

5. Please state what business records or writings, if any, of defendant reflect the dollar value claimed as a result of the alleged loss of each customer as specified in defendant's answer to interrogatory number 3.

6. As to each of the customers alleged to have been lost by defendant, state: (a) whether it was a prospective customer or an actual customer who was lost; and (b) if it was an actual customer, (i) the amount of revenues received from such customer prior to the cancellation; (ii) the period of time within which such revenues were received; (iii) the services rendered by Graphic Scanning; and (iv) the name of the person or persons in the customer's firm or organization who has personal knowledge of the facts set forth in answer to items (i), (ii), and (iii).

7. (a) In each case where a customer lost by defendant cancelled an existing contract with defendant, state the date and place at which the agreement between defendant and said customer was entered into, and whether said agreement was oral or in writing.

DELTA DATA'S INTERROGATORIES

(b) If such agreement was in writing, set forth a true and complete copy thereof; if said agreement was oral, state the date when it was made, the names of the officers, agents or servants of defendant Graphic Scanning Corporation with whom it was made, and its complete terms and conditions. If it is claimed that the agreement was partly written and partly oral, set forth an exact copy of that portion which is in writing and the substance of the part claimed to be oral.

8. Please state the names and addresses of every customer of defendant Graphic Scanning Corporation in the trucking industry to whom defendant provided specialized communications services prior to September 1, 1972.

9. Please state the name of the person or persons employed by defendant, if any, who have personal knowledge of the facts and data listed in defendant's answers to interrogatories numbers 1-8, inclusive.

10. Please state specifically in what manner defendant's "reputation and credibility in the trucking industry" was permanently injured, as alleged in paragraph 18 of defendant's counterclaim.

11. Please state that portion of the \$180,000 alleged to have been lost by defendant which is attributable to injury to defendant's reputation.

12. Please state the method of calculation which the defendant has used to arrive at the dollar amount lost by defendant

DELTA DATA'S INTERROGATORIES

and attributable to injury to defendant's reputation, as stated in answer to interrogatory number 11.

13. Please state what documents or writings, if any, reflect the dollar value of damages claimed by defendant as a result of the alleged injury to reputation.

14. Please state the name of the person or persons employed by defendant Graphic Scanning Corporation, if any, who have personal knowledge of the facts and data listed in answer to interrogatories numbers 10-13, inclusive.

15. Please state the sales and/or contracts lost which form the basis of defendant's claim of lost profits during the 40 day period of late delivery, as alleged in paragraph 19 of defendant's counterclaim.

16. Please state the name and address of each customer or customers involved in each lost sale and/or contract listed in answer to interrogatory number 15.

17. Please state the date or dates of the occurrence of each lost sale and/or contract listed in answer to interrogatory number 15.

18. Please state the gross amount of each lost sale and/or contract listed in answer to interrogatory number 15.

19. As to each of the lost sales and/or contracts listed in answer to interrogatory number 15, state that portion of the \$30,000 in lost profits claimed by defendant which is attributable to each such lost sale and/or contract.

DELTA DATA'S INTERROGATORIES

20. Please state the method of calculation which defendant has used to arrive at the dollar amount of net profit defendant claims would have been realized by defendant on each such lost sale and/or contract.

21. Please state what documents, if any, of defendant reflect the dollar value of the aforesaid lost profits.

22. (a) In each case where the defendant has allegedly lost a sale and/or contract during the 40 day period of late delivery, please specify whether the sales agreement and/or contract lost was oral or in writing.

(b) If such agreement was in writing, set forth a true and complete copy thereof; if said agreement was oral, state the date when it was made, the names of the officers, agents or servants of defendant Graphic Scanning Corporation with whom it was made, and its complete terms and conditions. If it is claimed that the agreement was partly written and partly oral, set forth an exact copy of that portion which is in writing and the substance of the part claimed to be oral.

23. Please state the name of the person or persons employed by defendant, if any, who have personal knowledge of the facts and data listed in answer to interrogatories numbers 15-22, inclusive.

24. Please list the peripheral equipment purchased by defendant for use in connection with the data communications

DELTA DATA'S INTERROGATORIES

system purchased by defendant from plaintiff, as alleged in paragraph 20 of defendant's counterclaim.

25. As to each item of peripheral equipment listed in answer to interrogatory number 24, specify the cost to defendant of such equipment.

26. Please state what documents, if any, of defendant reflect the dollar value of the aforesaid peripheral equipment.

27. Please state specifically in what manner each item of peripheral equipment listed in defendant's answer to interrogatory number 24 was "to be used in coordination with plaintiff's system".

28. Please state the company or companies from which each item of peripheral equipment listed in defendant's answer to interrogatory number 24 was purchased by defendant.

29. Please state the name of the person or persons employed by defendant, if any, who have personal knowledge of the facts and data listed in answer to interrogatories numbers 24-28, inclusive.

30. Please list and itemize the various other expenses incurred by defendant in the sum of \$10,000 as alleged in paragraph 20 of defendant's counterclaim.

31. Please state the dollar amount claimed to have been expended by defendant as to each expense item listed in answer to interrogatory number 30.

DELTA DATA'S INTERROGATORIES

32. Please state the date or dates on which each of the expenses listed by defendant in answer to interrogatory number 30 were incurred by defendant.

33. Please state what documents, if any, of defendant reflect the dollar value of the expense items listed in answer to interrogatory number 30.

34. Please state the name of the person or persons employed by defendant, if any, who have personal knowledge of the facts and data listed in answer to interrogatories numbers 30-33, inclusive.

Dated: September 5, 1973

GREEN, SHARPLESS & GREENSTEIN
Attorneys for Plaintiff

By: MELVIN D. KRAFT
MELVIN D. KRAFT
Of Counsel

DELTA DATA'S NOTICE OF MOTION
FOR DISCOVERY AND INSPECTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

NOTICE OF MOTION

Plaintiff,

-against-

Index No. 73 Civ. 1110
M.P.

GRAPHIC SCANNING CORPORATION,

Defendant.

-----x
S I R S :

PLEASE TAKE NOTICE that on the 5th day of October, 1973, at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, plaintiff, upon the annexed affidavit of Melvin D. Kraft, Esq., verified the 24th day of September, 1973, and upon all prior proceedings herein, will move this Court at Court Room No. 518 of the United States Courthouse, Foley Square, New York, New York, pursuant to Rule 34 and Rule 37(a) of the Federal Rules of Civil Procedure, for an order requiring defendant Graphic Scanning Corporation:

- (1) to permit plaintiff to inspect, examine, photograph and test the data communications equipment which plaintiff sold and shipped to defendant under a purchase order dated March 27, 1972, as hereinafter modified;

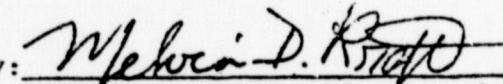
DELTA DATA'S NOTICE OF MOTION
FOR DISCOVERY AND INSPECTION

(2) to permit plaintiff to inspect, examine, photograph and test the data processing and other equipment presently used by defendant for the purpose of providing specialized communications services to the trucking industry at its premises at No. 99 West Sheffield Avenue, Englewood, New Jersey, or at such other premises where the said equipment may be located; and

(3) awarding such other and further relief as the Court may deem just and proper.

Dated: New York, New York
September 24, 1973

GREEN, SHARPLESS & GREENSTEIN
Attorneys for Plaintiff

By: 
MELVIN D. KRAFT, Of Counsel
36 West 44th Street
New York, New York 10036
Tel. 582-6940

TO: BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant
501 Madison Avenue
New York, New York 10022

**AFFIDAVIT OF MELVIN D. KRAFT
IN SUPPORT**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

-against-

AFFIDAVIT

Index No.
73 Civ. 1110
M.P.

GRAPHIC SCANNING CORPORATION,

Defendant.

-----x
STATE OF NEW YORK
ss.:
COUNTY OF NEW YORK

MELVIN D. KRAFT, being duly sworn, deposes and says:

1. I am counsel to Green, Sharpless & Greenstein, attorneys for plaintiff herein, and I submit this affidavit in support of this motion, pursuant to Rule 34 and Rule 37(a) of the Federal Rules of Civil Procedure for an order: (1) requiring defendant to permit plaintiff to inspect, examine, photograph and test certain data communications equipment sold by plaintiff to defendant under a purchase order dated March 27, 1972, as thereafter modified; and (2) requiring defendant to permit plaintiff to inspect, examine, photograph and test data processing and other equipment currently used by defendant for the purpose of providing specialized communications services to the trucking industry and located at No. 99 West Sheffield Avenue, Englewood.

**AFFIDAVIT OF MELVIN D. KRAFT
IN SUPPORT**

New Jersey, or other premises of defendant; and (3) awarding such other and further relief as the Court may deem just and proper.

2. This is an action by plaintiff to recover the agreed price and reasonable value of certain goods sold by plaintiff to defendant, namely, certain data communications equipment, and upon an account stated between plaintiff and defendant in the amount of \$34,275.81. In turn, the defendant, in its answer, dated April 19, 1973, and attached hereto as Exhibit "A", has interposed counterclaims seeking recovery of damages in the sum of \$265,000 alleged to have been sustained by defendant as a result of certain breaches of warranty and contract by defendant under the purchase order of defendant dated March 27, 1972, including breach of implied warranties of merchantability and fitness for use for a particular purpose. It is alleged in defendant's answer and counterclaims that as a result of the fact that the equipment sold by plaintiff to defendant did not operate as warranted, defendant suffered injury to its reputation and loss of customers, and incurred various expenses.

3. In order to properly prepare for trial and to defend against defendant's claim of breach of warranty, it is necessary that plaintiff be permitted to inspect and test the data communications equipment which it sold to defendant and which defendant claims never operated as warranted. If plaintiff is not permitted

**AFFIDAVIT OF MELVIN D. KRAFT
IN SUPPORT**

to examine and make tests of this equipment, it would be compelled to go to trial in ignorance of the nature of the alleged defects in the aforesaid equipment, if any, and, would therefore be unable to effectively defend against defendant's counterclaim.

4. On or about September 6, 1973, plaintiff served a request for discovery and inspection upon defendant, Graphic Scanning Corporation, in order to inspect, examine, photograph and test the aforesaid data communications equipment, which plaintiff sold and delivered to defendant under the purchase order dated March 27, 1972, which equipment, as stated above, is the basis of the counterclaim by defendant against plaintiff. A copy of plaintiff's request for discovery and inspection is hereto attached as Exhibit "B". The date for the requested discovery and inspection has now passed, and defendant refuses to allow the inspection requested by plaintiff, despite the fact that the discovery requested is obviously relevant and material to matters involved in this action. Defendant has served no written objection to the requested inspection on plaintiff; instead defendant's attorneys phoned my office and left a message to the effect that defendant objected to the requested discovery and inspection on the ground that it would be too expensive for defendant to remove the aforesaid equipment from storage. Defendant's counsel has failed to communicate with me any further on this subject.

**AFFIDAVIT OF MELVIN D. KRAFT
IN SUPPORT**

5. Plaintiff's aforesaid request for discovery and inspection [Exhibit "B"] also seeks to inspect, examine, photograph and test the data communications equipment which defendant is presently using to provide specialized communications services to the trucking industry and which is believed to be located at the premises of defendant at No. 99 West Sheffield Avenue, Englewood, New Jersey. At the deposition of defendant Graphic Scanning Corporation by Barry Yampol, its President, taken by plaintiff on August 28, 1973, Mr. Yampol testified concerning the operation of the system defendant is presently using, and at that time I made my first request of defendant to examine the system. [Deposition of defendant, pages 55-61 incl. attached hereto as Exhibit "C".] Plaintiff believes that an inspection of the aforesaid equipment in this system is relevant to this lawsuit in order to determine if, in fact, defendant's present equipment is of the same basic nature as that which the plaintiff sold to defendant, or, whether it is different in nature, purpose, and function from the equipment sold by plaintiff. Defendant and its counsel have also refused to allow plaintiff to examine the equipment in its present system both at the deposition of defendant as indicated in Exhibit "C" and by letter from defendant's attorneys to deponent, dated September 11, 1973, which argues quite frivolously that the requested inspection would disrupt defendant's business, and allow plaintiff to view

**AFFIDAVIT OF MELVIN D. KRAFT
IN SUPPORT**

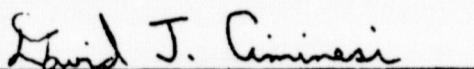
a system which defendant deems "confidential and secret". The aforesaid letter is attached hereto as Exhibit "D". In response to defendant's alleged objections, plaintiff believes that its inspection could easily be conducted with no interruption of defendant's business; furthermore, as to defendant's claim of confidentiality, plaintiff is willing to examine the aforesaid equipment under any reasonable confidentiality restriction which this Court might impose, and will certainly agree to use the information derived from said discovery and inspection only for purposes of this litigation, and for no other purpose.

WHEREFORE, it is respectfully requested that plaintiff's motion be granted in its entirety.



MELVIN D. KRAFT

Sworn to before me this
24th day of September, 1973.



David J. Ciminesi

DAVID J. CIMINESI
Notary Public, State of New York
No. 31-4504586
West New York County
22-1-5-2000-10-19-5

EXHIBIT A TO AFFIDAVIT OF MELVIN
D. KRAFT OMITTED

(ANSWER AND COUNTERCLAIMS)

EXHIBIT B TO AFFIDAVIT OF
MELVIN D. KRAFT OMITTED

(REQUEST FOR DISCOVERY AND
INSPECTION)

EXHIBIT C TO AFFIDAVIT OF MELVIN D. KRAFT

1 Yampol

55

2 I could be wrong on that, too. This is what I
3 believe.

4 Q Again, coming back to the equipment that
5 you ordered on March 27 on Purchase Order A 130, from
6 Delta --

7 A Yes.

8 Q -- was it contemplated at the time that you
9 ordered this equipment that you would use it in conjunction
10 with a computer?

11 A No. This was basically a stand-alone system. The
12 functions to be incorporated within this equipment are
13 basically the same as the computer. A computer --

14 Q Your answer is no?

15 A No.

16 Q Your answer is no to my question?

17 A Stand-alone unit.

18 Q When you were buying this equipment, was it
19 contemplated that this so-called system that you were
20 purchasing, this setup consisting of various pieces of
21 hardware, would be used for a limited amount of time,
22 somewhere in the neighborhood of six to nine months, and
23 then you would go on to a different kind of system, or
24 a different setup?

25 A It is a hard question to answer yes or no.

EXHIBIT C TO AFFIDAVIT OF MELVIN D. KRAFT

1 Yampol

50

2 No, if this system would be discarded; yes, if
3 we intended to go further on and develop more sophisticated
4 tools to handle our services.

5 In trucking we supply a number of services. If that
6 equipment was working today it could be utilized right
7 this minute. There is still a need for it. That type
8 of a system.

9 Q In fact, the system that you are using today
10 is a much more complicated and sophisticated system, is
11 it not?

12 A The only difference between that system and their
13 system is that this one works.

14 Q What is the present hardware that you are using
15 now to service your trucking industry customers? What
16 does it consist of?

17 A Hardware and software.

18 Q I am asking you, what are the pieces involved?

19 A What are the pieces involved?

20 Q Do you use display terminals?

21 A Yes.

22 Q Whose display terminals?

23 A I use a number of manufacturers, among which Hazeltine
24 is a major supplier.

25 Q Where is Hazeltine located?

EXHIBIT C TO AFFIDAVIT OF MELVIN D. KRAFT

1 Yampol 57

2 A : I believe they are located on Long Island. I don't
3 know the exact address. They moved recently.

4 Q Is there a multiterm box used in conjunction
5 with these display units?

6 A Define a multiterm box and I will tell you.

7 Q I am talking about the item on your purchase
8 order A 130. It says, one multiplexer, with eight to
9 five level conversion feature.

10 A No, they don't supply that.

Q Who doesn't supply it?

12 A Hazeltine.

13 Q Are you using such a piece of equipment now
14 with your display?

15 A Yes.

16 Q Who supplied that unit?

17 A Who supplied it?

18 Q Yes.

A company called IBM.

30 Q Now --

21 A IBM supplies the hardware. The software is supplied
22 by Wells.

23 Q So IBM has supplied you with your multiterm
24 multiplexer that you are now using; is that what you are
25 saying?

EXHIBIT C TO AFFIDAVIT OF MELVIN D. KRAFT

1 Yampol

58

2 A . IBM supplies hardware to the system which can do
3 speed and code conversion. I don't know how else to put it.

4 Q Well, do you know --

5 A To provide a function --

6 Q Do you know whether you have a multiplexer
7 now?

8 A I know we have a multiplexer.

9 Q Do you know who manufactured it?

10 A The multiplexer?

11 Q Yes.

12 A The multiplexer that Graphic Scanning is using now
13 is manufactured by Wells T.P. Sciences. It is in no
14 manner, shape or form similar to what yours does.

15 I mean, it is not for the same purpose.

16 Q What is the purpose of the multiplexer that
17 you are using now?

18 A To supply basically computer controlled functions
19 which are numerous and which I will be very happy to
20 supply you a listing of, which you couldn't sit here
21 and name because there are literally hundreds of functions
22 supplied in that multiplexer which are unique.

23 Q Does the system use a computer that you are
24 using now?

25 A I said yes, IBM. You can't say the system. What

EXHIBIT D TO AFFIDAVIT OF MELVIN D. KRAFT

BELLE WOLKOWITZ, DECUMAN & INMAN
 1000 BROADWAY
 501 MADISON AVENUE
 NEW YORK, NEW YORK 10019

DR. G. J. WOLKOWITZ
 ROBERT A. INMAN
 MICHAEL A. LEVY
 ROBERT J. SMOLIN
 MICHAEL DEGRASSE
 ROBERT DEEL

September 11, 1973

Telephone
 212-421-5400
 CABLE ADDRESS
 DEGRASSE
 1000 BROADWAY
 NEW YORK
 10019
 MICHAEL A. LEVY
 ROBERT DEEL
 COUNSEL

Melvin D. Kraft, Esq.
 Bar Building
 36 West 44th Street
 New York, New York 10036

Re: Delta Data Systems Corp. v.
Graphic Scanning Corp.

Dear Mr. Kraft:

This letter is to bring you up to date with respect to your various discovery requests concerning the above case.

1. I was informed yesterday that Thomas Wynne is no longer employed by the Company. Therefore, if you wish to continue your examination of Mr. Wynne it will be necessary for you to contact him personally and arrange further examination informally or in the alternative serve him with a subpoena.

2. Mr. Mattson has informed me that he is not personally knowledgeable as to the specific information concerning the various orders, invoices and payments and probably could not be very helpful in providing information to you. However, if you still wish to examine Mr. Mattson we will make him available.

3. Due to the fact that Mr. Wynne is no longer employed by Graphic we are having difficulty in gathering both the original correspondence which I provided to you as well as the additional correspondence which you requested. I must remind you, in this connection, that Graphic's recent partial move from 11 Broadway to Englewood, New Jersey is further complicating our search. I will provide this information to you as soon as it is available.

4. With respect to your interrogatories, I will be questioning the appropriate Company officials for the information and will provide answers in due course.

EXHIBIT D TO AFFIDAVIT OF MELVIN D. KRAFT

BELL, WOLKOWITZ, BECKMAN & KLEE

Melvin D. Kraft, Esq.

-2-

September 11, 1973

5. With respect to your request for Discovery and Inspection, I am presently verifying that the equipment described in paragraph 1 of your request is still at 11 Broadway. If it is, I would expect no problem in scheduling your examination for the date specified.

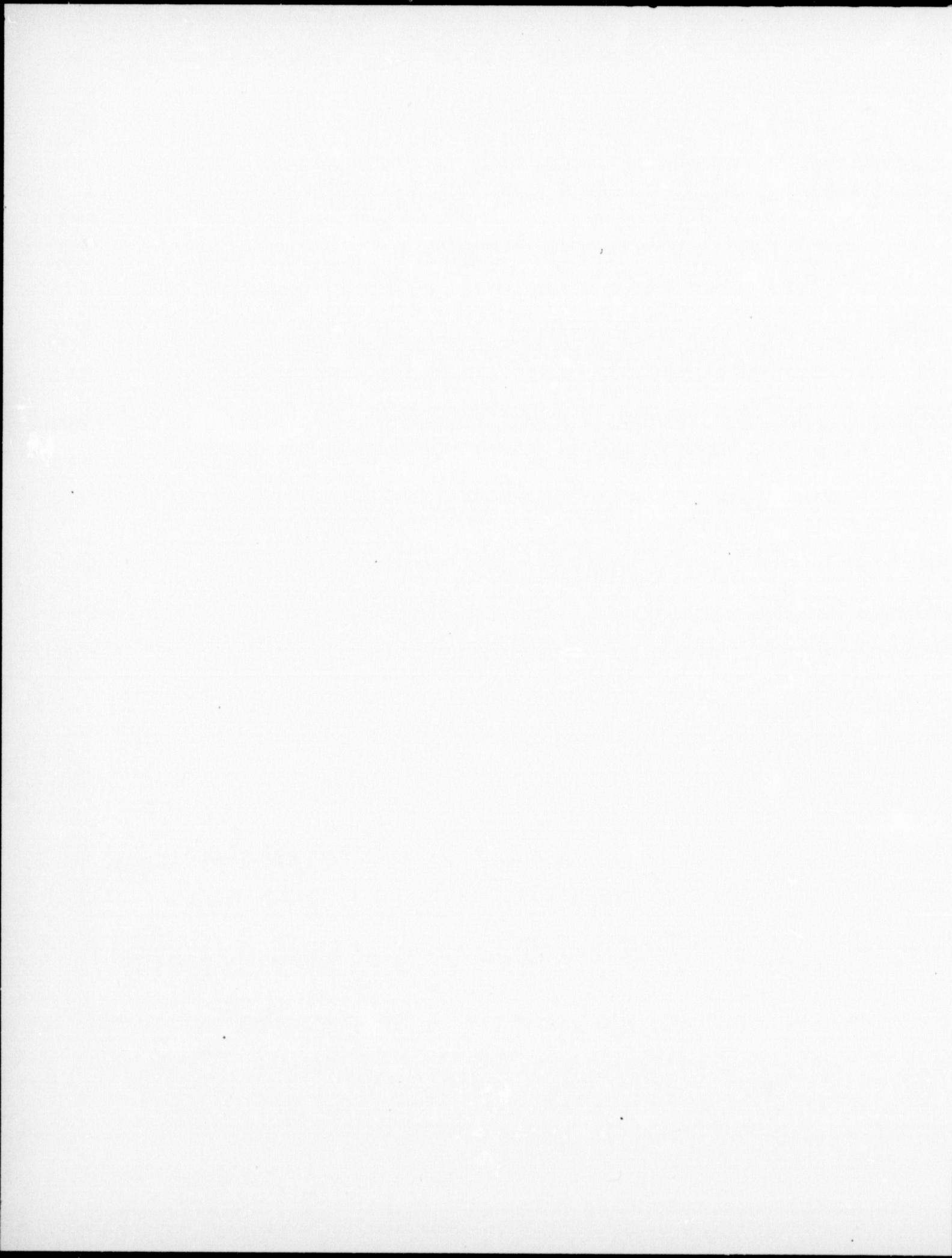
6. Concerning paragraph 2 of your request for inspection, it will not be possible to inspect, examine or test the equipment which is presently used by the defendant to provide specialized communications services to the trucking industry. The reason is that such an inspection would disrupt defendant's business which is presently functioning on a 24-hour day basis and further would allow the plaintiff to view a system which is deemed confidential and secret by the defendant. If it is necessary, we will seek a protective order to prevent such inspection.

Very truly yours,

BELL, WOLKOWITZ, BECKMAN & KLEE

By Barry H. Wolkowitz
Barry H. Wolkowitz

BHW:aw



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

-against-

GRAPHIC SCANNING CORPORATION,

Defendant.

Endorsement

73 Civ 1110 (mp) This case is set down for trial for Dec 3, 1973 at 10 A.M. (P.M. is 1:30) and dispute filing to January 1/26/74. The motion to upset agreement

is granted as follows:

1) Plaintiff may inspect the agreement and copy it to the defendant.

2) Plaintiff may also inspect the replacement agreement (discrepancy device) in a form other than the one within defendant's offer of compromise in Exhibit A and defendant's agreement to Plaintiff's offer of compromise in Paragraph 1. Plaintiff may inspect the agreement in Paragraph 1 of the agreement of the agreement of the agreement.

3) Plaintiff may inspect the agreement after a time and place to be agreed by Plaintiff and Defendant.

4) Plaintiff may inspect the agreement at a time and place to be agreed by Plaintiff and Defendant.

Service of copy of the within

is hereby admitted.

Dated, 11/13/73

Attorney(s) for Plaintiff
K. C. Engman

ANSWERS TO INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

-against-

INTERROGATORIES

GRAPHIC SCANNING CORP.,

73 Civ. 1110 M.P.

Defendant.

-----X
The defendant as and for its interrogatories, pursuant to the plaintiff's request, states as follows:

1-9. The defendant's claim for damages as a result of its loss of customers, loss of business and loss of revenue as a result of the breach of contract and breach of warranty by the plaintiff can not be substantiated without an extensive investment of time and money by the defendant and in addition would result in bringing into this litigation the customers of the defendant and therefore the defendant is withdrawing its claim for damages for these items and agrees not to assert a claim for these damages without first providing the plaintiff with the information requested in Items 1 through 9 of its request for Interrogatories.

10. The defendant's reputation was injured due to the fact that the defendant represented to its potential customers and the various State Departments of Transportation that it had a working system to obtain and transmit overweight and overdimension permits

ANSWERS TO INTERROGATORIES

when in fact its system did not function reliably; when the equipment installed in the offices of the defendant's customers and the various State Departments of Transportation offices would not perform the services for which it was intended, the defendant's reputation as to its being able to meet its commitments was injured; and otherwise caused the persons with whom the defendant conducted business to lose faith in the defendant's reputation to meet its obligations.

11. The defendant's damages to its reputation is claimed to be \$50,000.

12. The defendant computes its losses sustained as a result of the injury to its reputation as approximately the amount expended and the amount which will be expended to convince the companies in the Trucking Industry and the various State Departments of Transportation that the defendant has a viable communication data processing system and the amount of the permanent injury to the defendant's reputation.

13. The bills from advertising agencies and time sheets, and expense records of marketing personnel of the company.

14. Glenn Mattson and William B. Connelly.

15-22. The defendant can not calculate the number of sales that were lost, the names and addresses of the customers who would have done business with it during the 40 days that the system was late without a large expenditure of time and money and without involving the customers of the defendant which might have an adverse effect on the defendant's business and therefore the defendant will not assert a claim for these damages in this litigation.

ANSWERS TO INTERROGATORIES

23. Glenn Mattson and William B. Connely.

24., 25 and 28.

<u>Description</u>	<u>Supplier</u>	<u>Purpose</u>	<u>Cost</u>
Tape Punch and Rack	Futuronics Corp. 178 Hawse Avenue Freeport, N.Y.	Punch Tape and Racks for two units	\$ 3,750.00 1,132.00 \$ 4,882.00
Tape Convertor	Tab & Tape, Inc. 376 Broome Street New York, N.Y. 10013	Convert from BAUDOT to ASCII Codes or vice versa	\$ 6,767.75
Operator Tables	Unavailable	Hold CRTs	\$ 972.00
Modems	The Vadic Corp. 920 Commercial Avenue Palo Alto, Calif.	Transmission and Receipt of Data	\$ 2,196.00
	Anderson Jacobson, Inc. 1065 Morse Avenue Sunny Vale, Calif.		\$ 5,400. 00
Printers	Printer Technology, Inc. Sixth Road Woburn, Mass.	Print Hard Copies	\$18,020.31
*CRTs	Hazeltine Corp. 620 Fifth Avenue New York, N.Y. 10020	Replace CRTs	\$ 8,500.00

26. The documents which the defendant has that reflect the dollar value of the peripheral equipment are invoices from the suppliers and ledger sheets showing the amounts paid.

29. The names of the persons who have personal knowledge of the facts and data concerning items 24 to 28 inclusive, are William B. Connely and Glenn Mattson.

30. The various other expenses incurred by the defendant as a

ANSWERS TO INTERROGATORIES

result of the plaintiff's breach of contract and breach of warranty is the amount expended for telephone line hook ups which could not be utilized as a result of the failure of the plaintiff to timely deliver the equipment and its failure to operate; the amount expended to repair the equipment; and the amount expended to redesign, purchase and build a workable system.

31. The dollar amount expended by defendant as to each item listed above is (a) telephone lines \$1,300.00: (b) \$1,153.81 expended for repairs to the system; and (c) Redesigning the system designed by the defendant 14 man months, at \$7,500 per month.

32. The date or dates upon which each of the expenses incurred by the defendant are as follows:

- (a) Telephone Bills - May 15, 1972 to July 1, 1972.
- (b) Repairs - Delta dated October 17, 1972.
- (c) The redesign of the system took place from in or about August, 1972 up to and including February, 1973.

33. Invoices from Delta Data Systems Corporation, bills from the telephone companies and payroll records.

34. The name of the persons who had personal knowledge of the facts and data in answer to interrogatories 30-33 inclusive are Barry Yampol and Glenn Mattson.

Dated: New York, New York
November 9, 1973

BELL, WOLKOWITZ, BECKMAN &
KLEE
Attorneys for Defendant

By _____
Sidney A. Weisberg, Counsel

VERIFICATION OF BARRY YAMPOL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BARRY YAMPOL, being duly sworn, deposes and says that deponent is the President of GRAPHIC SCANNING CORP., the corporation named in the within action; that deponent has read the foregoing interrogatories and knows the contents thereof; and that the same is true to deponent's best information and belief. This verification is made by deponent because defendant is a Delaware corporation. Deponent is an officer thereof, to wit, its President. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: Conversations with the officers and employees of the Corporation, and books and records on file in the offices of the Corporation.

GRAPHIC SCANNING CORP.

By Barry Yampol
Barry Yampol, President

Sworn to before me this
9th day of November, 1973

BARRY H. WOLKOWITZ
Notary Public, State of New York
No. 31-9720565
Qualified in New York County
Commission Expires March 30, 1977

STIPULATION DATED NOVEMBER 16, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

- against -

STIPULATION

GRAPHIC SCANNING CORP.,

73 Civ. 1110 M.P.

Defendant.

-----x

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto as follows:

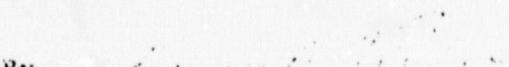
1. The defendant hereby withdraws so much of its counter-claim contained in paragraphs numbered 18 and 19 of its answer as claims damages for loss of customers and loss of profits, ~~including~~ ~~any~~ ~~and~~ ~~all~~ ~~other~~ ~~claims~~ ~~for~~ ~~recovery~~ ~~of~~ ~~any~~ ~~kind~~ ~~or~~ ~~type~~ ~~of~~ ~~damages~~ ~~or~~ ~~any~~ ~~other~~ ~~claims~~ ~~arising~~ ~~out~~ ~~of~~ ~~the~~ ~~transaction~~ ~~in~~ ~~question~~
2. The plaintiff agrees to withdraw so much of its interrogatories as relates to the above counterclaim, to wit, items 1 through 7 and 15 through 22 in its request for interrogatories dated September 5, 1973.

Dated: New York, New York
November 16, 1973

GREEN, SHARPLESS & GREENSTEIN
Attorneys for Plaintiff

By 
MELVIN D. KRAFT
Of Counsel

BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant

By 
SIDNEY A. WEISSBERG
Of Counsel

So Ordered
Milton Belack
United States District Judge
Nov. 19, 1973

DEPOSITION OF GRAPHIC SCANNING BY
BARRY YAMPOL PAGE 250

MR. KRAFT: This is the deposition of Mr. Yampol. It is taking place today pursuant to the order of Judge Pollack, which he made this morning on my application under Rule 37 to dismiss the counterclaim for the failure of Graphic Scanning to adhere to Judge Pollack's order of November 6, 1973, which required the production of certain documents and the serving of answers to certain interrogatories, and also required Graphic Scanning to appear for a deposition by Mr. Yampol on November 13, 1973.

As stated at the outset, Judge Pollack, upon hearing the application, ordered Graphic Scanning to appear by Mr. Yampol for this deposition at 1:00 P.M., in this office.

It is now 1:30, and Mr. Yampol has appeared with Mr. Weisberg, and I am ready to proceed.

MR. WEISBERG: I just want to put on the record the fact that on today's date, at approximately 11:00 A.M. or 11:30 A.M., Mr. Kraft requested that a certain document referred to in the deposition of Mr. Yampol conducted on August 28, 1973, referred to, I believe, on page 110, be produced this afternoon, and said document has been produced

NOTICE TO TAKE DEPOSITION
OF DELTA DATA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

NOTICE TO TAKE
DEPOSITION

- against -

73 Civ. 1110 M. P.

GRAPHIC SCANNING CORP.,

Defendant.

-----x

TO: MELVIN D. KRAFT, ESQ.
Attorney for Plaintiff
36 West 44th Street
New York, New York 10036

SIRS:

PLEASE TAKE NOTICE, that pursuant to the Federal Rules of Civil Procedure, the undersigned will take oral depositions of the persons listed in Schedule A, annexed hereto, at the offices of Bell, Wolkowitz, Beckman & Klee, 501 Madison Avenue, New York, New York 10022, on November 27, beginning at 10 A.M. and continuing until no earlier than 4:30 P.M., on the days listed in Schedule A, annexed hereto, by an officer authorized by the laws of the State of New York to administer oaths.

Dated: New York, New York
November 19, 1973

BELL, WOLKOWITZ, BECKMAN &
KLEE
By Sidney A. Weisberg
Counsel
Attorneys for Defendant
501 Madison Avenue
New York, N.Y. 10022
421-3311

SCHEDULE A TO NOTICE TO TAKE
DEPOSITION OF DELTA DATA

SCHEDULE A

<u>Name of Person to be examined</u>	<u>Date of Examination</u>
Howard Podgurski	November 23, 1973 10 A.M.
I. Gary Bard	November 24, 1973 10:30 A.M.
Francis X. McEntee	November 27, 1973 10 A.M.
Elbert Bloom	November 27, 1973 2 P.M.

**GRAPHIC SCANNING'S SECOND REQUEST
FOR PRODUCTION OF DOCUMENTS**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

- against -

GRAPHIC SCANNING CORP.

**SECOND REQUEST
FOR PRODUCTION
OF DOCUMENTS**

73 Civ. 1110 M.P.

Defendant.

----- x

TO: MELVIN D. KRAFT, ESQ.
Attorney for Plaintiff
36 West 44th Street
New York, New York 10036

SIRS:

PLEASE TAKE NOTICE, that the defendant, Graphic Scanning Corp., pursuant to Rule 34 of the Federal Rules of Civil Procedures, request the plaintiff, Delta Data Systems Corporation to produce and permit the defendant to inspect and copy each of the following documents:

1. Records of all bills of lading indicating the equipment delivered by the plaintiff to the defendant during the period September 1971 through October 1972, inclusive, indicating the equipment delivered and the dates and place where delivered.

2. All records of telephone communications between the plaintiff and defendant, or the defendant and plaintiff, including memorandum, logs, memos and records of all types, indicating the date when the telephone calls were made, any messages left and records of all such telephone conversations.

**GRAPHIC SCANNING'S SECOND REQUEST
FOR PRODUCTION OF DOCUMENTS**

The aforesaid records are requested to be produced at the offices of the defendant's counsel, 501 Madison Avenue, New York, N.Y. 10022, on November 27, 1973 at 2 P.M.

Dated: New York, New York
November 19, 1973

BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant
501 Madison Avenue
New York, New York 10022

By Sidney A. Weisberg
Sidney A. Weisberg, Esq.
Counsel

DEPOSITION TO BE TAKEN OF GRAPHIC
SCANNING BY ED FENNING, PAGE 3

1

3

2

MR. KRAFT: This deposition this after-
noon is ordered by Judge Pollack this morning
in Chambers and was also the subject of a dis-
cussion in chambers yesterday between counsel
and Judge Pollack.

7

The deposition was to proceed this
afternoon at 2:00 p.m. It was to be a deposition
of Graphic Scanning Corporation by Mr. Ed Fenning.

10

11

Let the record reflect that it is now
2:15 p.m. and Mr. Fenning is not here and I am
told by counsel that he will not be here this
afternoon.

14

15

MR. WEISBERG: Let the record further
reflect that Mr. Fenning is unavailable and that
his whereabouts are not known to the defendant
nor to the counsel for the defendant.

18

19

(Letter of agreement dated November
14, 1973 of counsel is marked Plaintiff's Exhibit
1 for identification.)

21

22

(Time noted: 2:16 p.m.)

23

24

1 **MP** **TRANSCRIPT OF PROCEEDINGS**
2 **11/20/73**2 **UNITED STATES DISTRICT COURT**3 **SOUTHERN DISTRICT OF NEW YORK**4 **-----x**5 **DELTA DATA SYSTEMS CORPORATION, :**6 **Plaintiff, :**7 **versus : 73 Civ 1110**8 **GRAPHIC SCANNING CORPORATION, :**9 **Defendant. :**10 **-----x**11 **New York, N. Y.**12 **November 20, 1973 - 3:00 p.m.**

13

14 **before**15 **HON. MILTON POLLACK,**16 **District Judge**17 **(In Chambers)**18 **APPEARANCES:**19 **MELVIN D. KRAFT, Esq.,**
20 **of Counsel for Plaintiff**21 **SIDNEY WEISSBERG, Esq.,**
22 **of Counsel for Defendant**

23

24

25

2 THE COURT: What is the application?

3 MR. KRAFT: Your Honor, this is my application:

4 on behalf of plaintiff, under Rule 37, to strike the answer
5 and counterclaim of the defendant in this action for the
6 latest in a series of defaults and violations of Court orders
7 and stipulations by the defendant and, in particular, the
8 latest one being that your Honor this morning ordered the
9 defendant, Graphic Scanning Corporation, to appear for a de-
10 position this afternoon by Mr. Ed Fenning, the operations
11 manager of the defendant.

12 This deposition had been previously arranged be-
13 tween counsel by a letter dated November 14, 1973, which is
14 marked Plaintiff's Exhibit Number 1, and this deposition was
15 discussed yesterday in chambers at a conference before your
16 Honor, and it was understood that Mr. Fenning was going to
17 appear.

18 Late last evening, I was informed that the defend-
19 ant did not wish to produce Mr. Fenning, whereupon I suggested
20 that we immediately bring this matter before your Honor, and
21 this morning we did come before your Honor, and your Honor
22 ordered Mr. Fenning to appear at two p.m. this afternoon in
23 Room 601.

24 At about one o'clock this afternoon I was informed
25 by Mr. Weissberg that Mr. Fenning would not appear, that he

4 could not be found. At two o'clock this afternoon we met in
5 Room 601 and adjourned to an examination room ordered by the
6 Clerk, and Mr. Fenning's and Graphic Scanning's default was
7 noted by the reporter.

8 I would like to say for the record, your Honor,
9 that in this action, as I indicated in the beginning, this is
10 the culmination of a series of defaults and violations of
11 this Court's orders for discovery, and I will be happy to
12 enumerate them, if your Honor thinks it is appropriate at
13 this time.

14 THE COURT: Enumerate them.

15 MR. KRAFT: This Court ordered the deposition of
16 Graphic Scanning to take place by Mr. Barry Yampol, the
17 president of Graphic Scanning, on November 13, 1973.

18 The defendant's attorneys were apprised of this ruling, and,
19 incidentally, they were present in chambers here ^{WHEN} with the
20 ruling was made, on November 6th, but just to be sure that
21 they knew and that they knew what they were supposed to do,
22 I wrote them a letter on November 6th apprising them of this
23 ruling.

24 On Tuesday, November 13th, Mr. Yampol did not ap-
25 pear. The night before November 13th, Mr. Weissberg, who is
26 here today, told me on the telephone that Mr. Yampol would
27 not appear, and I told him that there was an order of the

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 Court outstanding and that the Court would expect Mr. Yampol
2 to appear. Mr. Weissberg told me that it was not convenient
3 for Mr. Yampol to appear, that he had other plans that day,
4 and so, consequently, Mr. Yampol did not appear on November
5 13th.

6 We then came before your Honor, and your Honor
7 ordered Mr. Yampol to appear yesterday at one o'clock in my
8 office, and Mr. Yampol did appear, I should add, at one-thirty
9 p.m. yesterday, with Mr. Weissberg, and he was deposed.

10 On November 6th, under the order made by your
11 Honor, the defendant was to answer the plaintiff's interrogatories.
12 Those interrogatories had been outstanding since
13 September 5th and have not been answered, and your Honor
14 ordered that those interrogatories should be answered no
15 later than November 10, 1973, at noon. In fact, those interrogatories
16 were not answered at noon on November 10th. Interrogatories Number 1 through 7 and 15 through 22 were not
17 answered at all. The indication was made in the defendant's
18 answer to the interrogatories that the defendant was withdraw-
19 ing certain portions of the counterclaim, but the defendant
20 refused to execute a stipulation withdrawing those portions
21 of its counterclaim, and, consequently, I had to come before
22 your Honor -- I think yesterday morning is my recollection --
23 in order to press my application to move to have the defendant

1 MP

TRANSCRIPT OF PROCEEDINGS
11/20/73

5

either withdraw those counterclaims or to have your Honor dismiss them, and at that time I was offered a stipulation in writing dated November 16th by the defendant offering to withdraw those portions of its counter-claims, and your Honor so ordered it.

However, as I have pointed out to the defendant, the defendant has still not answered Interrogatories 8 and 9, and those interrogatories are outstanding, and those interrogatories should have been answered by November 10th, under your Honor's order, and I have said to Mr. Weissberg orally on the telephone and in person and by letter that I expect those interrogatories to be answered, but as of today they are still not answered.

Furthermore, your Honor, we had quite a problem inspecting the equipment of Graphic Scanning, and on November 8th your Honor made an order that the inspections of the so-called replacement equipment of Graphic Scanning and the equipment sold by Delta Data to Graphic Scanning were to take place at Graphic Scanning's premises at West Cheftfield Avenue in Englewood, New Jersey, at nine a.m. on Thursday, November 8th and there was quite an issue made, your Honor, about the fact that Graphic Scanning did not want the inspection to take place at its premises in Englewood, New Jersey, of the equipment that Delta Data had sold to it. They were willing

2 to have the inspection take place as to the replacement
3 equipment but not as to the equipment sold.

4 Your Honor ruled against them and said that since
5 the equipment was supposed to be physically there -- that is,
6 the sold equipment -- both inspections should take place.

7 When I arrived at the premises of Graphic Scanning
8 with representatives of Delta Data, we found and we learned
9 for the first time on the day of the inspection that some of
10 the equipment sold by Delta Data to Graphic Scanning was
11 not there physically, and it was still at 11 Broadway. So
12 we then had to go to 11 Broadway to look at the equipment.
13 and when we got to 11 Broadway, my representatives found
14 that some of the equipment was not there, that it had been
15 given to some third party.

16 Finally, as to documents, your Honor, under your
17 order of November 6th, you had ordered that all documentary
18 production by the defendant should be completed no later
19 than November 10, 1973, at noon. That documentary production
20 was not completed at noon on November 10th. Indeed, it has
21 not even been completed to this present time, because al-
22 though some time after November 10th I did get a lot of
23 documents, there are still some documents outstanding even
24 as of now.

25 Yesterday, in Mr. Yampol's deposition that you

1 MP

TRANSCRIPT OF PROCEEDINGS
11/20/73

7

2 ordered, I pointed out that in Mr. Yampol's deposition that
3 took place on August 27, 1973, at page 121, my question was:

4 "I ask you to produce any documents from Hazeltine
5 or from Graphic Scanning which will show the first de-
6 livery of Hazeltine's CRTs.

7 "A Yes."

8 That documentary production has been outstanding
9 since August 28th, and yesterday, when I examined Mr. Yampol
10 and he was supposed to have with him the Hazeltine records,
11 he showed me certain records, and he himself said these re-
12 cords do not establish the date of delivery of the Hazeltine
13 equipment. He admitted that on the record to me.

14 And so we have a situation where as of yesterday
15 Mr. Yampol said to me that he has not produced the records
16 in this instance that were requested on August 28th.

17 There are other instances, your Honor, but, frankly,
18 I feel that they are superfluous at this point, because
19 there has been a pattern of dilatory conduct, obstructionism,
20 refusal to honor stipulations and letters, refusal to honor
21 the orders of the Court, that has put the plaintiff in this
22 case to great trouble and expense and has interfered with our
23 discovery and has prevented its completion.

24 I think, under all the circumstances, your Honor,
25 there has been a total violation of the discovery rules, and

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 MP

8

2 I think that the plaintiff is entitled to an order dismissing
3 the counterclaim and entering judgment on the complaint.

4 THE COURT: All right. Mr. Weissberg, what do
5 you want to say?

6 MR. WEISSBERG: I believe, from reading the file
7 in this case, that there has been a complete breakdown of
8 communications between the attorneys for the plaintiff and
9 the defendant.

10 I point out to the Court a letter dated May 4,
11 1973, written by Mr. Kraft to the attorneys for the defendant,
12 which letter provided for the deposition of the plaintiff to
13 take place on May 31, 1973. To date, that deposition has not
14 been taken and has not been scheduled.

15 The second instance with regard to the deposition
16 of Mr. Yampol: his default was not wilful on November 14th
17 but was rather, as explained to the Court, due to a break-
18 down in communication between Mr. Beckman and myself and
19 the client, and therefore his deposition was conducted on
20 November 19th. In that regard, your Honor, the default there
21 was not the default of the defendant; it was the default of
22 the attorneys.

23 Secondly, it should be noted that the deposition
24 originally took place in August and was not rescheduled
25 until November, that the Court ordered the deposition of Len

TRANSCRIPT OF PROCEEDINGS

11/20/73

9

1 Matson and Tom Wing to be taken on November 13th and 14th
2 and the depositions of Tom Wing and Len Matson were taken
3 on those dates.

4
5 The Court ordered certain inspection of equipment
6 to take place, and the inspection did take place in accord-
7 ance with the Court's order.

8
9 With regard to the deposition of Edward Fenning
10 today, Mr. Kraft's letter of November 14th correctly states
11 that the deposition was agreed to by his office and myself,
12 subject to confirmation. The confirmation of the deposition
13 was that the deposition of the plaintiff would take place
14 and that it was tentatively scheduled for the week of
15 December 3rd and was based upon the erroneous impression by
16 counsel for both plaintiff and defendant that the December
17 3rd date set for trial could be adjourned so that the
18 deposition could be completed.

19 When, yesterday, it became apparent that we were
20 unable to adjourn this December 3rd date, I tried to make
21 arrangements with Mr. Kraft -- Excuse me -- Prior to the
22 letter of November 14th and on that date, Mr. Kraft and I
23 had a discussion as to whose deposition would be taken on
24 November 20th, the plaintiff's or the defendant's, and the
25 defendant agreed to the defendant's deposition being taken
on that date, subject to counsel's belief that the depositions

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 MP

10

2 of the plaintiff would take place.

3 On November 19, 1973, I tried to arrange a depon-
4 ure schedule with Mr. Kraft but was unable to do so, in that
5 he refused to return my telephone call, and that is when I
6 asked for the appointment before the Court today.

7 THE COURT: Where is Mr. Fenning?

8 MR. WEISSBERG: As of today, this morning, the
9 Court ordered Mr. Fenning to appear at two o'clock. Mr.
10 Fenning was not at work this morning and was not at home, and
11 I personally called him at both locations. He came in to
12 work at two-thirty this afternoon, and I was called into the
13 Court's chambers to tell me that he had appeared at work and
14 was available for his deposition.15 I asked Mr. Kraft to adjourn this deposition for
16 an hour, but he refused.17 THE COURT: In other words, you can have him here
18 in an hour?

19 MR. WEISSBERG: Yes.

20 THE COURT: All right. Get him here. In addition
21 to that, I want to cover some other matters.22 On November 6, 1973, I ordered the answers to the
23 interrogatories be made by hand delivery by noon of Saturday,
24 November 10, 1973. That date and time were arranged for
25 with your predecessor, associate in your law firm. At that

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 MP

11

2 time it was made perfectly clear and accepted by both coun-
3 sel that, failing to answer those interrogatories timely,
4 there would be sanctions imposed.

5 The plaintiff's attorney states that Interrogatories
6 8 and 9 have not been answered.

7 Next, on November 6, 1973, I ordered that document-
8 ary discovery be completed on or before November 10, 1973,
9 again advising both counsel, which they both accepted, that
10 there would be sanctions for failure to do so.

11 Next, the defendant has a counterclaim in this
12 case, and on November 19, 1973 submitted a stipulation with-
13 drawing all allegations of the counterclaim except those with
14 respect to damage to the defendant's reputation, leaving as
15 the only counterclaim in the case the alleged damage to the
16 defendant's reputation and the alleged consequences thereof.

17 MR. WEISSBERG: Excuse me --

18 THE COURT: Yes?

19 MR. WEISSBERG: I believe there is more to the
20 defendant's counterclaim that was left in than just that,
21 your Honor.

22 THE COURT: Have you got a copy of that stipulation
23 with you?

24 MR. WEISSBERG: Yes, your Honor; I believe I do.

25 There is a change in here --

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 MP

12

2 THE COURT: The stipulation reads:

3 "The defendant hereby withdraws so much of his
4 counterclaim contained in Paragraphs 18 and 19 of its
5 answer as claims damages for loss of customers and loss
6 of profits, leaving only the claim for damages to its
7 reputations."8 As I read the counterclaim, I know of no other
9 claim for damages asserted in that counterclaim. If there
10 is any, I wish you would point it out to me here and now.11 MR. WEISSBERG: Your Honor, there is a claim for
12 damages as a result of purchasing equipment to be used in
13 conjunction with the system sold to the defendant by the
14 plaintiff, and there is a claim for damages for the amount
15 expended by the defendant in having to develop a new system
16 to replace the system of the plaintiffs, which did not func-
17 tion properly.

18 Your Honor, I would like to say --

19 THE COURT: So that the three elements of the
20 counterclaim are now the alleged damage to the defendant's
21 reputation, the cost of purchasing other replacement equip-
22 ment and the amount expended for a new system. Is that
23 right?24 MR. WEISSBERG: No. Number 1 would be the amount
25 expended for equipment to be used in conjunction with the

1 MP

TRANSCRIPT OF PROCEEDINGS
11/20/73

13

2 plaintiff's equipment.

3 Can I also say, your Honor --

4 THE COURT: Yes.

5 MR. WEISSBERG: -- that the defendant did serve
6 its interrogatories upon the plaintiff timely. There was a
7 question --8 THE COURT: You don't mean interrogatories. You
9 mean answers.10 MR. WEISSBERG: Answers to interrogatories. I am
11 sorry.

12 THE COURT: Did you answer Numbers 8 and 9?

13 MR. WEISSBERG: The only question, Number 8 --
14 if I can state this on the record -- I assume --15 THE COURT: Here are Numbers 8 and 9. Did you
16 answer them?17 MR. WEISSBERG: No, your Honor. 8 and 9 were not
18 answered. Can I state why?19 I thought Mr. Kraft was withdrawing his demand
20 for interrogatories numbered 1 through 9 when I informed
21 him of the defendant's withdrawing of its claim for these
22 actions.23 MR. KRAFT: Your Honor, the stipulation that was
24 signed very clearly indicates that only Interrogatories 1
25 through 7 were withdrawn and 15 through 22.

TRANSCRIPT OF PROCEEDINGS
11/20/73

14

1 MR. WEISSBERG: Your Honor, that evening before,
2 after we drafted the answers to interrogatories, I told Mr.
3 Kraft that the answer to Interrogatory Number 8 was William
4 Connolly, and Number 8 -- the only question Number 8, which
5 is whether or not Number 8 is still relevant to the case, in
6 view of the defendant's withdrawing of its cause of action.

7 THE COURT: Is Mr. Fenning to be examined on either
8 Items 8 and 9 of the interrogatories --

9 MR. WEISSBERG: No.

10 THE COURT: Mr. Kraft --

11 MR. WEISSBERG: I am sorry.

12 MR. KRAFT: That might have been one of the sub-
13 jects I might have touched on, your Honor.

14 THE COURT: I am not interested in gross specula-
15 tions. I want to know whether that is part of the information
16 that he would have in his managing status.

17 MR. KRAFT: Yes.

18 THE COURT: Then, that being so, you can get that
19 information when he arrives here, according to the instruc-
20 tions to produce him here within the next hour.

21 MR. WEISSBERG: Your Honor, can I call him and
22 have him sent here?

23 THE COURT: Just a minute, will you please?

24 What else is there as to which the plaintiff has

TRANSCRIPT OF PROCEEDINGS

11/20/73

1 MP

15

2 frustrated by this procedure on the part of the defendant?

3 MR. KRAFT: Well, we don't have the Hazeltine
4 information, your Honor, which I just referred to before in
5 my presentation.

6 THE COURT: Is that relevant to the counterclaim?

7 MR. KRAFT: Yes.

8 THE COURT: What else don't you have, if anything?

9 MR. WEISSBERG: May I be heard for just a moment,
10 your Honor?11 MR. KRAFT: Well, we have not gotten a complete in-
12 spection, as I indicated, your Honor, because were told that
13 some of the equipment was not there where it was supposed to
14 be.15 THE COURT: A complete inspection of whose equip-
16 ment?17 MR. KRAFT: Of Graphic's, Graphic Scanning's
18 equipment.19 MR. WEISSBERG: This is the first I have heard of
20 this, your Honor.

21 THE COURT: Is that related to the counterclaim?

22 MR. KRAFT: Yes.

23 MR. WEISSBERG: Your Honor, this is the first we
24 have heard of that.

25 MR. KRAFT: I think those are the main items, your

1 MP

TRANSCRIPT OF PROCEEDINGS
11/20/73

16

2 Honor.

3 THE COURT: The rulings of the Court are as
4 follows:5 Mr. Fenning is to be produced and examined here,
6 this afternoon, within the hour.7 The defendant's counterclaim will be refused at
8 the trial, and the defendant will be denied the opportunity
9 to introduce any of the designated matters in that counter-
10 claim, namely, the damage to its reputation, the cost of
11 purchasing other equipment to be used in conjunction with
12 the plaintiff's equipment and the amount expended for a new
13 system, as elements of counterclaim against the plaintiff at
14 the trial.15 The Court is satisfied that the defaults recited
16 by the attorney for the plaintiff have occurred and that they
17 are factually and legally inexcusable and have required the
18 assistance of the Court in order to partially correct those
19 defaults.20 The Court will withhold any further sanctions in
21 respect of those defaults for the time being and until after
22 Mr. Fenning has been examined, at which time the Court will
23 consider whether or not the disobedience of the defendant
24 warrants the striking out of the alleged defenses and the
25 entry of a judgment by default in favor of the plaintiff.

TRANSCRIPT OF PROCEEDINGS
11/20/73

1 MP

17

2 You may now call Mr. Fenning -- the phone is right
3 outside -- and arrange to have him here.

4 MR. WEISSBERG: I would like to state for the
5 record that the alleged refusal to produce documents was
6 contested by the defendant, since all documents in its posse-
7 sion were produced, and only documents which were not in its
8 possession are still outstanding.

9 THE COURT: Now you have an official record, which
10 will be certified up to the Court of Appeals for any purpose
11 that may be appropriate in this case. This is an official
12 court reporter.

13 ---

14

15

16

17

18

19

20

21

22

23

24

25

75
NOTICE OF MOTION TO VACATE SANCTION
AND COMPEL DISCOVERY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

NOTICE OF MOTION

- against -

73 Civ. 1110 M.P.

GRAPHIC SCANNING CORP.,

Defendant.

-----x

TO: MELVIN D. KRAFT, ESQ.
Counsel for Plaintiff
36 West 44th Street
New York, N.Y. 10036

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of BARRY H. WOLKOWITZ, duly sworn to on the 21st day of November, 1973 and upon the affidavit of BARRY YAMPOL, duly sworn to on the 21st day of November, 1973, a motion will be made before the Honorable Milton Pollack, United States District Judge, at Chambers, for the Southern District of New York, on the 27th day of November, 1973, for an order:

(a) Pursuant to the Federal Rules of Civil Procedure 60(b) for an order relieving the defendant from the final judgment order or proceeding by reason of mistake, inadvertence, excusable neglect and other reasons set forth in the accompanying affidavits justifying relief from the operation of the order and judgment;

(b) Pursuant to Federal Rules of Civil Procedure 37(a) compelling plaintiff to appear at the offices of the defendant or at such other and reasonable place as this Court may deem proper on the 28th day of November, 1973, or at such other time as this Court may deem just and proper to have its deposition taken.

NOTICE OF MOTION TO VACATE SANCTION
AND COMPEL DISCOVERY

-2-

(c) And for such other and further relief as this Court may
deem just and proper.

BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant
501 Madison Avenue
New York, New York 10036

By Sidney A. Weisberg
Sidney A. Weisberg, Counsel

**AFFIDAVIT OF BARRY WOLKOWITZ
IN SUPPORT**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

- against -

GRAPHIC SCANNING CORP.,

Defendant.

**AFFIDAVIT IN SUPPORT
OF MOTION**

73 Civ. 1110 M.P.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

BARRY H. WOLKWOTZ, being duly sworn, deposes and says:

1. He is an attorney at law, licensed to practice his profession in the State of New York.

2. This affidavit is submitted in order for the Court to understand the chronology of this litigation:

(a) The complaint was filed on March 14, 1973.

(b) The answer was filed on April 19, 1973.

(c) A reply was filed by the plaintiff on May 23, 1973.

(d) Subsequent to receipt of the reply your deponent had conversations and meetings with clients and attorneys with respect to settlement of this matter. Settlement could not be accomplished and on September 5, 1973 attorney for plaintiff served lengthy interrogatories, 34 in number.

(e) On May 15, 1973, the plaintiff's counsel served a request for production of documents upon attorneys for the defendant. The attorney complied with the notice as best he was able shortly thereafter.

This Court should be made aware that defendant moved from New York to New Jersey during the period of April 1973 to October, and much of the documentation that plaintiff sought was searched for as the records became available. The records were not available by reason of the

AFFIDAVIT OF BARRY WOLKOWITZ
IN SUPPORT

-2-

extensive move, and therefore, defendant's counsel could not certify that all the documents had been provided until November 1973, which was approximately one month after the move had been completed.

Counsel for the plaintiff and defendant in May 1973 agreed that the plaintiff would complete its discovery and that the plaintiff was not required to serve its documents upon the defendant's counsel until after the fully documents requested of defendant had been/produced. In addition, counsel for the defendant agreed that the defendant would not take the plaintiff's depositions until after the defendant's deposition of the defendant had been completed.

(f) On May 18, 1973, counsel for the defendant served a request for production of documents upon counsel for the plaintiff.

(g) Plaintiff continued its deposition on occasions, to wit,

(a) Barry Yampol on August 28, 1973; (b) Tom Wynn on August 28, 1973; (c) Glenn Mattson, Treasurer of defendant on November 13, 1973; (d) Tom Wynn on November 14, 1974; (d) Barry Yampol on November 19, 1973 and (e) Edward Fenning on November 20, 1973

(h) On November 7, 1973 a conference was arranged in the Judge's Chambers concerning the request of plaintiff to inspect the equipment which is the subject matter of this case. Counsel for the defendant appeared at that conference by Michael Beckman, Esq. During that meeting, ground rules were set for the completion of the plaintiff's discovery and inspection. At no time at that meeting did the question of defendant's deposing and inspecting plaintiff come to any aspect of an order as the plaintiff had not completed its discovery and inspection of defendant. It was determined at that meeting that further depositions of defendant were to be taken by plaintiff; and a date was set for November 14, 1973 for further depositions. On November 13 Glenn Mattson,

79
AFFIDAVIT OF BARRY WOLKOWITZ
IN SUPPORT

-3-

Treasurer of the defendant was examined for an entire day by plaintiff's counsel. The President of the defendant corporation was to have been examined on November 13, 1973, however, the plaintiff desired to examine the defendant's treasurer, Glenn Mattson and he was produced on November 13 and deposed from 11 A.M. to 7 P.M.

(i) The following day, November 14, 1973, the deposition of an independent witness, a former employee of defendant was scheduled and said deposition took place. The independent witness proceeding from out of State had his deposition taken; the deposition was adjourned by plaintiff's counsel and has to date not been completed. In that plaintiff's counsel has scheduled the continuation of this deposition for December 5, 1973 in Philadelphia.

(j) On November 13 or 14th, plaintiff and defendant's counsel agreed that Barry Yampol's deposition would be taken on or about the week of November 19th. Subsequent thereto, a conference was held with the Honorable Court, at which time the Judge prescribed that Yampol's deposition should be taken on the afternoon of November 19. Barry Yampol, at great expense and inconvenience, at the direction of this Court, made himself available and his deposition was taken and completed on November 19, 1973.

(k) On November 14, 1973, Mr. Kraft and Sidney A. Weisberg, counsel to this firm, had a conversation, during which they tried to schedule the remaining deposition of plaintiff and defendant, keeping in mind the admonition of this Court that trial would commence on or about December 3, 1973.

(l) Sidney A. Weisberg, counsel for defendant, consented to the completion of defendant's deposition on November 20, 1973, so long

**AFFIDAVIT OF BARRY WOLKOWITZ
IN SUPPORT**

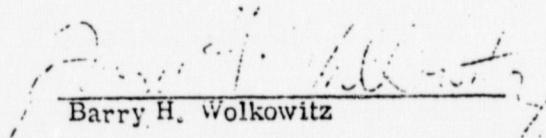
-4-

as defendant's depositions of plaintiff could commence and be completed prior to the trial of this action. The next date plaintiff's counsel could schedule the depositions was December 3, 1973, in view of counsel's plaintiff's trip to Florida and trip to England.

(m) On November 19, 1973, the Court informed counsel for both sides that the December 3rd date was firm and the case would not be adjourned, and therefore the agreement between counsel as originally made on November 14 to take plaintiff's deposition was void. Counsel for the defendant requested a conference on November 20, 1973 for the purpose of compelling discovery of plaintiff. Attached hereto is the notice to take deposition of plaintiff as Exhibit and the further request for production of documents.

(n) At the meeting of November 20, 1973 the Court struck the counterclaim and stated defendant was not entitled to depositions. Defendant will be seriously prejudiced in this matter without permitting the jury to hear depositions on the case in chief and the counterclaim and defendant is willing to proceed forthwith as it has heretofore, pursuant to the agreement between counsel to take the depositions of plaintiff prior to trial.

Without the deposition of plaintiff and the counterclaim being heard at one time, defendant will be seriously prejudiced in this matter. The sanction imposed by the Court upon the defendant is so serious that it is respectfully prayed same be vacated and the case be brought to trial on December 3, and the defendant have its right to have its matter tried on that date and the deposition of plaintiff be taken forthwith.


Barry H. Wolkowitz

Sworn to before me this

21 day of November, 1973

AFFIDAVIT OF BARRY YAMPOL
IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

- against -

GRAPHIC SCANNING CORP.,

Defendant.

-----x
AFFIDAVIT IN SUPPORT
OF MOTION

73 Civ. 1110 M.P.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BARRY YAMPOL, being duly sworn, deposes and says:

1. On or about the 14th day of March, 1973 only 8 months ago, the plaintiff served the defendant with a summons and complaint. On April 19, 1973 the answer was served containing at paragraphs 3 through 20 a counterclaim of \$205,000, alleging among other things a breach of warranty, loss of customers, injury to defendant's reputation and damages incurred in an attempt to cover the goods sold and delivered, a copy of which summons, complaint and answer is attached hereto as Exhibits A and B.

2. As this Court will recognize this case is presently 8 months old.

3. This affidavit is submitted as an affidavit of merit for the purpose of opening any default that may have occurred with respect to the counterclaim.

4. With respect to the merits contained in the counterclaim, your deponent has the following personal knowledge: The defendant on or about March 27, 1972 placed an order for certain equipment in the amount of \$32,070 from the plaintiff. Thereafter the defendant ordered subsequent equipment from the plaintiff to be used in addition to, and in conjunction with the equipment ordered on March 27, 1972. This equipment is sophistica

82
AFFIDAVIT OF BARRY YAMPOL
IN SUPPORT

-2-

electronic equipment to be used in a communications system which was installed by the plaintiff in the defendant's place of business and elsewhere. Your deponent relied upon the skill and knowledge of the plaintiff in the design, installation and maintenance aspects of such system. Said installation occurred in or about June, 1972 later than promised and was installed at that time by the plaintiff. At the time the equipment was installed it became apparent to both the plaintiff and defendant that the equipment was not operating properly, and the defendant gave notice to the plaintiff forthwith. Subsequent thereto the plaintiff's service personnel proceeded to the defendant's place of business over a period of the next five months but was unable to (and still could not) correct the defects.

5. In December, 1972, in writing and prior thereto, orally, counsel for the defendant and officers of the defendant informed the plaintiff to remove the installation and equipment. To date, the equipment is still at defendant's place of business and elsewhere, continues to remain there inoperative and is being held in storage for the plaintiff.

6. Defendant has sustained large damages by reason of this breach of warranty and breach of contract, and respectfully prays this Court vacate the default entered on the 20th day of November, 1973 with respect to defendant's counterclaim and set this case down for a trial on the merits.

WHEREFORE, your deponent prays that the relief set forth in the notice of motion be granted.

Barry Yampol

Sworn to before me this

21st day of November, 1973

BARRY H. WOLKOWITZ
Notary Public, State of New York
No. 3197-2955
Qualified in New York County

AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

AFFIDAVIT IN
OPPOSITION

-against-

73 Civ. 1110 M.P.

GRAPHIC SCANNING CORPORATION,

Defendant.

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

MELVIN D. KRAFT, being duly sworn, deposes and says:

1. I am of counsel to Green, Sharpless & Greenstein, attorneys for plaintiff herein, and respectfully submit this affidavit in opposition to the motion of defendant brought on by an undated notice of motion, returnable on November 27, 1973, to which is annexed affidavits verified November 21, 1973, of Messrs. Yampul and Wolkowitz, seeking relief under Rules 60(b) and 37 of the Federal Rules of Civil Procedure.

2. My office was served with these motion papers on Friday, November 23, 1973 [the day after Thanksgiving], while I was enroute to Florida for the Thanksgiving Day weekend with my family, a fact which was known to defendant's counsel. Defendant obviously sought to bring this motion on without affording plaintiff adequate and proper notice under Rule 6(d) of the Federal

**AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION**

Rules of Civil Procedure. I, therefore, object to the Court's consideration of the motion on that ground.

Even if the Court were to proceed to consider the motion on its merits over my objection, the Court would, at the least, be compelled to schedule argument and submission of the motion no sooner than November 30, in order to allow a proper five day period for the submission of the motion after service of the motion papers as provided in Rule 6. [Under Rule 6(a) intermediate Saturdays and Sundays are not to be counted when the period of time prescribed is less than seven days.] Since such a motion, i.e. one for pre-trial discovery and revival of the stricken counterclaim, could not conceivably be timely on Friday, the last court day before trial, which is presently scheduled to begin on December 3, the motion should be denied summarily without the necessity and burden of further proceedings thereon.

3. In addition to the foregoing, the Court can and should deny the motion summarily at this time because, on its face, the motion is wholly groundless, and, indeed, frivolous for at least the following reasons:

(a) The case was scheduled to be tried on December 3, by the Court's Order dated October 24, 1973. It is, therefore, quite ludicrous for defendant to make a formal motion at this time for pre-trial discovery under Rule 37(a), just a

**AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION**

few days before the trial. Moreover, at a conference before the Court requested by defendant's counsel for the stated purpose of obtaining such a discovery order, the Court ruled, on November 20, 1973, that neither party would be entitled to conduct further discovery after November 20, 1973, in light of the December 3 trial date.

(b) The defendant fails to advance any facts or reasons which show why the Court should now reverse its own November 20 order under Rule 37(b) striking the counterclaim. In essence, and without going into needless detail, the Court struck the counterclaim in response to plaintiff's Rule 37 motion by reason of the refusals of defendant to obey discovery orders of the Court, such disobedience including:

- (1) the successive defaults of defendant's representatives in appearing for Court-ordered depositions;
- (2) the defendant's failure to produce documents in response to the order of the Court; and
- (3) the defendant's failure to answer interrogatories as ordered by the Court.

On several occasions, both by telephone and letter, I warned defendant's counsel that I might have to move for relief by reason of defendant's delays in making discovery. As an example, I attach hereto my letter to defendant's lawyers dated November 1, 1973, as Exhibit "A".

**AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION**

The record of the Court's Rule 37 decision, as set forth in the transcript of the November 20 proceedings, is respectfully incorporated herein by reference and denominated Exhibit "B".

In amplification of the failure of defendant to comply with that portion of the order of the Court dated November 6, 1973, requiring, among other things, documentary production by defendant on or before November 10, 1973, at noon, referred to at page 6 of the transcript (Exhibit "B"), no documents were produced by noon on November 10 by defendant's counsel. Nor was any certification furnished me to the effect that a search had been made by that date. I annex hereto copies of my letters of November 6 and November 12, 1973, and a copy of defendant's counsel's letter to me dated November 14, 1973, marked respectively as Exhibits "C-1", "C-2", and "C-3".

(c) Nor has any memorandum of law been served with defendant's motion, as required by the Rules of this Court [Rule 9(b)], which demonstrates that Rule 60(b) is a proper legal vehicle to reverse a prior Rule 37(b) order of the Court entered prior to final judgment. I do not believe it is a proper vehicle, although we have not had an adequate opportunity to research the issue.

(d) The Court actually has been lenient in the Rule 37 ruling of which defendant complains. The Court's ruling referred to above struck the defendant's counterclaim, but left

**AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION**

standing that portion of defendant's answer which interposes a denial to the complaint of plaintiff, and, also, an affirmative defense to the complaint. Actually, the Court had and has the discretionary power to grant the entire motion of plaintiff which was to strike out both defendant's entire answer and counter-claim. At the bottom of page 16 of the transcript containing the Court's order referred to above (Exhibit "B"), the Court stated the following, after striking the counterclaim:

"The Court is satisfied that the defaults recited by the attorney for the plaintiff have occurred and that they are factually and legally inexcusable and have required the assistance of the Court in order to partially correct those defaults.

The Court will withhold any further sanctions in respect of those defaults for the time being and until after Mr. Fenning has been examined, at which time the Court will consider whether or not the disobedience of the defendant warrants the striking out of the alleged defenses and the entry of a judgment by default in favor of the plaintiff."

In fact, although the examination session of Mr. Fenning ordered by the Court has now been completed, there are still portions of the discovery orders of the Court which have not as yet been complied with by defendant. To mention only some of them:

- (1) Answers to plaintiff's interrogatories Nos. 8 and 9 have not yet been served by defendant [See Exhibit "B", pp. 5, 13, 14].

AFFIDAVIT OF MELVIN D. KRAFT
IN OPPOSITION

(2) The documentary production is still not complete, e.g. the document showing the first date of Hazeltine's delivery of equipment to defendant's premises has still not yet been produced [Exhibit "B", p. 7].

Hence the grounds for the Court's determination are continuing, and, may, indeed, warrant the striking out of the entire answer and entry of judgment for plaintiff.

The foregoing enumeration of the grounds upon which this motion should be summarily denied, on its face, is offered, as stated above, without prejudice to the contention of plaintiff that it has not received adequate notice of this motion.

WHEREFORE, it is respectfully requested that the motion be denied in its entirety.

s/ Melvin D. Kraft

MELVIN D. KRAFT

Sworn to before me this
28th day of November, 1973.

DAVID J. CIPINESI
Notary Public, State of New York
No. 31-4504590
Qualified in New York County
Commission Expires November 30, 1973

EXHIBIT A TO AFFIDAVIT OF MELVIN
D. KRAFT IN OPPOSITION

November 1, 1973

Barry Wolkowitz, Esq.
Bell, Wolkowitz, Beckman & Klee
501 Madison Avenue
New York, New York 10022

Re: Delta Data Systems Corporation v.
Graphic Scanning Corporation

Dear Mr. Wolkowitz:

This is to acknowledge receipt of your letters of October 22, October 25 and October 31, 1973.

As you are aware, the Court has set the case down for trial on December 3, 1973, in its order dated October 24, 1973, a copy of which I am enclosing.

I am becoming concerned over the tenor of your letters which keep delaying the discovery that if this pattern of delay continues, the plaintiff will not be able to complete its discovery prior to the trial.

Please telephone me about this tomorrow; otherwise, I will have no choice except to make an application to the Court to rectify the situation.

Sincerely yours,

Melvin D. Kraft

MOK:bh
Enclosure

EXHIBIT C-1 TO AFFIDAVIT OF MELVIN
D. KRAFT IN OPPOSITION

November 6, 1973

Michael Beckman, Esq.
Bell, Wolkowitz, Beckman & Klee
501 Madison Avenue
New York, New York 10022

Re: Delta Data Systems Corporation v.
Graphic Scanning Corporation

Dear Mr. Beckman:

In this afternoon's conference before Judge Pollack, he ruled as follows:

1. In connection with the inspection of Graphic Scanning's equipment in Englewood, New Jersey, defendant's contention that any inspection of such equipment is precluded by the doctrines of trade secret or private confidential information was overruled. Defendant, at its option, may submit a protective order prohibiting misuse of any such trade secret or private confidential information.

2. The inspections of both the replacement equipment of Graphic Scanning and the equipment sold by Delta Data to Graphic Scanning will take place, as scheduled in my letter of November 2, 1973, at Graphic Scanning's premises at No. 99 West Sheffield Avenue, Englewood, New Jersey, at 9:00 A.M. on Thursday, November 8, 1973.

3. As to the equipment sold by Delta Data to Graphic Scanning, it should be uncrated and ready for inspection by Delta Data's representatives at the time and place above mentioned.

EXHIBIT C-1 TO AFFIDAVIT OF MELVIN
D. KRAFT IN OPPOSITION

Michael Beckman, Esq.

-2-

November 6, 1973

4. If the physical circumstances of the inspection of the sold equipment interfere with a full and proper inspection, Delta Data, at its option, may reschedule the inspection at No. 11 Broadway at its expense. The latter expense will consist of the services of a technician at \$96 for each 1/2 day of his services, or \$192 for the full day, and the actual moving bill submitted to Delta Data by the mover.

5. In addition to the foregoing, Judge Pollack ordered that answers to the interrogatories and documentary production by Graphic Scanning are to be placed in my hands no later than November 10, 1973, at noon. Needless to say, I request that you place this material in my hands, if possible, on Thursday or Friday.

6. The depositions of Messrs. Yampol and Matson are to proceed next Tuesday, November 13, and of Mr. Wynne next Wednesday, November 14, as scheduled.

The foregoing represents the substance of the Court's ruling on all of these matters.

Very truly yours,

Melvin D. Kraft

MDK:bn

EXHIBIT C-2 TO AFFIDAVIT OF
MELVIN D. KRAFT IN OPPOSITION

November 12, 1973

Sidney A. Weisberg, Esq.
Bell, Wolkowitz, Beckman & Klee
501 Madison Avenue
New York, New York

Re: Delta Data Systems Corporation
v. Graphic Scanning Corporation

Dear Mr. Weisberg:

This is to advise that as of this afternoon Graphic Scanning is in default under Judge Pollack's order, the content of which I confirmed by my letter to your firm dated November 6, 1973, in the following particulars:

1. The answers to plaintiff's interrogatories do not contain answers to interrogatories No. 8, No. 9 and No. 27.
2. As I told you on the telephone, I cannot accept the failure of Graphic Scanning's answers to the interrogatories to answer items 1 through 7 or 15 through 22 without receiving from you a stipulation withdrawing Graphic Scanning's claims for loss of customers, and loss of sales and profits. Originally, when we talked on the telephone late Thursday afternoon, you stated that you would submit such a stipulation forthwith; when we talked Saturday morning you still had not submitted such stipulation but promised that I would have it by eleven o'clock this morning; I still do not have the stipulation.
3. Documentary Production. Under item No. 2 of Mr. Wolkowitz' letter to me of October 22, I have not received either "the remaining documents" or a "statement that the Company cannot locate any further documents requested". Again, under the Court's order, I should have received the documents or statement by noon on Saturday; again I was promised that material by today and I do not have it today.

EXHIBIT C-2 TO AFFIDAVIT OF MELVIN
D. KRAFT IN OPPOSITION

Sidney A. Weisberg, Esq.

-2-

November 12, 1973

This is to advise that I consider Graphic Scanning to be in default under the Court's order and will be compelled to take such steps as are necessary under the circumstances.

Very truly yours,

Melvin D. Kraft

MDK:bh

EXHIBIT C-3 TO AFFIDAVIT OF
MELVIN D. KRAFT IN OPPOSITION

BELL, WOLKOWITZ, BECKMAN & KLEE
COUNSELLORS AT LAW
501 MADISON AVENUE
NEW YORK, NEW YORK 10022

ROBERT BELL
BARRY H. WOLKOWITZ
MICHAEL BECKMAN
RICHARD ALTS
RICHARD J. SWOLAN
MICHAEL A. LEVY

TELEPHONE
(212) 421-5311
CABLE ADDRESS
"BELKLEE"
SIDNEY A. WEISSMAN
COUNTY

November 14, 1973

Melvin D. Kraft, Esq.
33 West 44th Street
New York, New York 10036

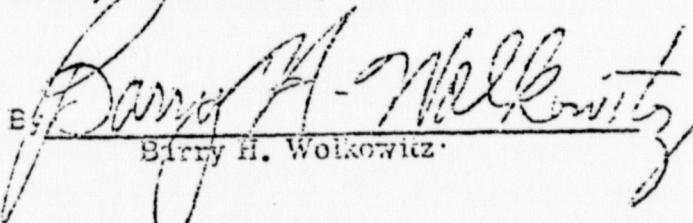
Re: Delta Data Systems Corporation v.
Graphic Scanning Corp.

Dear Mr. Kraft:

This letter will certify to you that pursuant to our instructions, our client, Graphic Scanning Corp., has made a diligent search of its books and records and has forwarded to us all copies of documents pursuant to the plaintiff's request. The defendant has represented to us that it has not been able to find further documents, at this time, other than those which have heretofore been forwarded to you, and the undersigned certifies that to the best of our information and belief, copies of all requested documents have heretofore been delivered to you.

Very truly yours,

BELL, WOLKOWITZ, BECKMAN & KLEE


Barry H. Wolkowitz

BHW/jm

**GRAPHIC SCANNING'S FURTHER
ANSWERS TO INTERROGATORIES**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
DELTA DATA SYSTEMS CORPORATION,

Plaintiff,

-against-

GRAPHIC SCANNING CORP.,

**FURTHER ANSWERS
TO INTERROGATORIES**

73 Civ. 1110 M.P.

Defendant.

-----X
Defendant as and for its further answers to the plaintiff's
Interrogatories alleges as follows:

8. The name and address of all of the trucking customers of the defendant, prior to September 30, 1972 are:

Bruce Transfer & Storage Co.	4700 J. Street S.W. Cedar Rapids, Iowa
C & H Transfer Company, Inc.	P.O. Box 5976 Dallas, Texas 75222
W.J. Casey Trucking & Rigging	184 Doremus Avenue Newark, New Jersey
Cedar Rapids Steel Transfer, Inc.	P.O. Box 68 Cedar Rapids, Iowa
Crete Carrier Corp.	P.O. Box 249 Crete, Nebraska 68333
Daily Express Co.	P.O. Box 39 Carlisle, Pa. 17013
Home Transfer Co. Inc.	1425 Franklin Road Marietta, Ga. 30060
International Transport, Inc.	2450 Marion Road S.E. Rochester, Minn. 55901
Jetco, Inc.	4701 Eisenhower Avenue Alex, Virginia

**GRAPHIC SCANNING'S FURTHER ANSWERS
TO INTERROGATORIES**

Kreitz Motor Express	220 Park Road Wyomissing, Pa.
Matson, Inc.	P.O. Box 43 Cedar Rapids, Iowa
A.J. Melter Hauling & Rigging, Inc.	P.O. Box 3507 Knoxville, Tenn. 37917
Midwestern Express	P.O. Box 189 Fort Scott, Kansas 66701
Moss Trucking Co. Inc.	P.O. Box 8409 Charlotte, N.C.
Pan American Van Lines	25-57 Jericho Turnpike Bell Rose, New York
C.H. Robinson Co.	3033 Excelsior Blvd. Minnesota, Missouri 55416
Trans-American Van Service, Inc.	8900 S. Freeway Fort Worth, Texas
Trinity Industry Inc.	P.O. Box 1529 Rocky Mt. N. Carolina
Tri-State Motor Freight Company	P.O. Box 1 B Joplin, Mo. 64801

9. The person with personal knowledge of items 1-9 is Barry Yampol.

Dated: November 28, 1973

BELL, WOLKOWITZ, BECKMAN & KLEE
Attorneys for Defendant

By

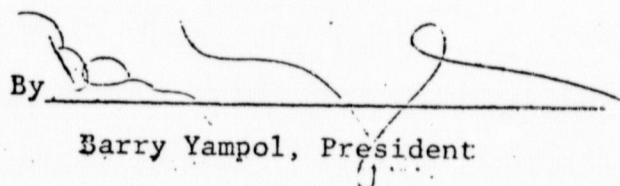
Sidney A. Weisberg, Counsel
501 Madison Avenue
New York, New York 10022
421-3311

VERIFICATION OF BARRY YAMPOL

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK)

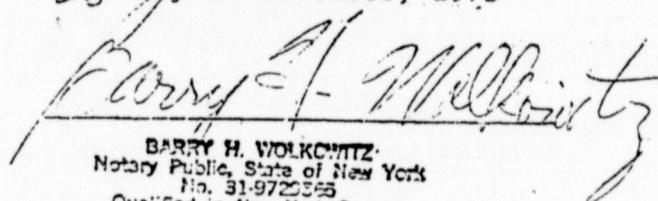
BARRY YAMPOL, being duly sworn, deposes and says that deponent is the Present of GRAPHIC SCANNING CORP., the corporation named in the within action; that deponent has read the foregoing further Answers to Interrogatories and knows the contents thereof; and that the same is true to deponent's best information and belief. This Verification is made by deponent because defendant is a Delaware corporation. Deponent is an officer thereof, to wit, its President. The grounds of deponent's belief as to all matters not stated upon deponents knowledge are as follows: Conversations with the officers and employees of the Corporation, and the books and records on file in the offices of the Corporation.

GRAPHIC SCANNING CORP.

By 
Barry Yampol, President

Sworn to before me this

28th day of November, 1973


BARRY H. VOLKOWITZ
Notary Public, State of New York
No. 31-9722355
Qualified in New York County
Commission Expires March 30, 1974

1 [28] Kaelin-direct-cross

2 MR. KRAFT: I offer this in evidence.

3 MR. WEISSBERG: No objection.

4 (Plaintiff's Exhibit 8 for identification
5 received in evidence.)

6 THE COURT: What is the date on the exhibit?

7 MR. KRAFT: That's a group of invoices beginning
8 with one dated May 15, 1972.

9 BY MR. KRAFT:

10 Q Mr. Kaelin, I show you Plaintiff's Exhibit No.
11 8 which is the statement rendered by Delta Data to Graphic
12 Scanning dated November 21, 1972, and I ask you whether,
13 to your knowledge, there is any letter or memorandum in
14 the files of Delta Data or whether Delta Data received any
15 letter or memorandum from Graphic Scanning taking exception
16 to that particular statement?

17 A To my knowledge there is no letter or any
18 objection taken to this amount.

19 Q Was the amount of \$34,275.81, or any part
20 thereof, paid by Graphic Scanning to Delta Data after
21 November 21, 1972?

22 A No. This ties in with our ledger cards.

23 MR. KRAFT: I have no further questions.

24 CROSS-EXAMINATION
25 BY MR. WEISSBERG:

Q Mr. Kaelin, you are, in effect, the financial

1 [57] Kaelin-cross

2 being charitable when I am saying that.

3 BY MR. WEISSBERG:

4 Q Can you identify this letter dated July 18,
5 1972 which was sent to Mr. Gary Borden from Mr. Thomas
6 Flynn?

7 A It is a letter, yes.

8 Q Have you seen that letter before?

9 A No.

10 Q Do your records reflect the fact that on July
11 13th, 1972 you sent an invoice, or an acknowledgment,
12 No. DLN005 which confirmed the lease of \$510 a month?

13 A Yes.

14 Q Before we had reference to two delivery receipts
15 which showed MRAs on them. Where are the MRAs which would
16 let us know what equipment was actually returned to the
17 defendant?

18 A In our files in Cornwells Heights.

19 Q Do you have a fax machine there?

20 A We have a Xerox machine.

21 Q That would make fax copies?

22 A Yes.

23 Q Could you fax those copies to our office so we
24 have them for this afternoon?

25 MR. KRAFT: I object to that.

1 [58] Kaelin-cross2 THE COURT: You may answer whether that is pos-
3 sible.4 A It is not possible. Do you mean transmit them
5 over lines?

6 Q Yes. We have a fax machine.

7 A We don't have a fax machine. We have a Xerox
8 machine.

9 Q It sends facsimile copies, our machine.

10 A We could not do that.

11 Q Has it ever occurred that someone returned
12 equipment to you under a MRA and that equipment was never
13 redelivered? Has that ever occurred?

14 MR. KRAFT: I object to that, your Honor.

15 THE COURT: Sustained.

16 Q Does the plaintiff have a policy with regard to
17 giving their customers a credit in the event certain equip-
18 ment is returned under a MRA and not redelivered to the
19 customer?

20 MR. KRAFT: Objection, your Honor.

21 THE COURT: Sustained.

22 MR. WEISSBERG: No further questions.

23 THE COURT: Is there any redirect?

24 MR. KRAFT: A little, your Honor.

25

[77] Kaelin-direct

2 for these items.

A I don't have the information at all.

4 2 Take a look at the plaintiff's exhibits.

5 Would your records reflect that?

A They should indicate the serial numbers on them.

7 Q Do you know whether or not these items were
8 returned to the defendant?

9 A I don't have that information available.

10 Q Where is that information?

11 In our main plant.

12 Q In Pennsylvania?

13 A Yes.

14 Q I would like to show you this factory service
15 report and ask you if you can identify it.

16 A Yes

17 Q What is that document I have showed you? Is
18 that a copy of an official record kept by the defendant in
19 the regular course of its business?

20 A Yes.

21 MR. WEISSBERG: I would like to offer this in
22 evidence.

23 MR. KRAFT: Is this something we supplied you?

24 MR. WEISSBERG: Yes.

25 MR. KRAFT: No objection.

1 [133] Borden-direct

2 what did you mean by that?

3 A Be paid our bill.

4 Q Up to the time of August, 1972, in your opinion,
5 was the equipment which you had delivered previously
6 functioning properly?

7 A Yes, to the best of my knowledge.

8 Q How often were service representatives sent to
9 the premises of Graphic Scanning Corporation from the
10 period of June 1, 1972 through August 1, 1972?

11 A I don't have firsthand information on that.

12 Q Do you have any records that would reflect this
13 fact?14 A I would assume that these invoices that we
15 have prepared would reasonably reflect that.16 Q Are those invoices and service reports which were
17 furnished to us the total number of service calls which were
18 made?19 A Not necessarily. We could have made some that
20 we didn't charge for either by act or design.21 Q Of your own knowledge, do you know whether or
22 not Frank McEntee was ever on the premises of Graphic
23 Scanning Corporation?24 A I believe so. I'm not sure how to define my
25 own knowledge. I did not see him there. It is my under-

1 [134] Borden-direct

2 standing that he did spend time on the premises.

3 Q Are you also aware of the fact that Bob Burke
4 was on the premises at Graphic Scanning Corporation in
5 connection with rendering services to the defendant?

6 A It is my impression that he was.

7 Q Were you also aware of the fact that no reports
8 of their services having been rendered have ever been pro-
9 vided for the defendant to examine?

10 A No.

11 Q Do you have such records?

12 A I don't know.

13 Q Did Mr. McEntee ever file a report for the
14 work that he did?

15 A I don't know. I assume he made some reports.

16 Q Where would these reports be?

17 A It is hard to say. Mr. McEntee was not a
18 field service man. I think he was involved with the
19 installation of the system, and, as such, it is not his
20 procedure to write a report as a field service man was
21 supposed to write a report. They might be in the field
22 service department.

23 Q Does that same comment also apply to Mr. Burke?

24 A Mr. Burke -- yes, I guess it would.

25 MR. WEISSBERG: No further questions.

1 [161] McEntee-direct2 to you and said they have modified what they thought they
3 needed. Is that what they said?

4 THE WITNESS: Yes.

5 Q In other words, the original configuration was
6 changed at a later date.7 A Yes, sir. Somewhere around -- I guess it
8 started -- twenty days after the initial order.

9 Q Did you build the new system?

10 A Yes. The add-on boxes, yes.

11 Q Who did the actual technical work on designing
12 all of this equipment?

13 A Bob Burke.

14 Q I would like to show you Defendant's Exhibit M
15 for identification and see if you recognize the reports and
16 the notes contained in this exhibit (handing).

17 A (Pause.)

18 Q Those are your technical reports for the system?

19 A Some of the technical documentation for it, yes.

20 MR. WEISSBERG: I would like to offer this in
21 evidence, your Honor.22 MR. KRAFT: May I inquire of counsel whether
23 these are documents turned over to him from the files of
24 Delta Data?

25 MR. WEISSBERG: Yes.

2 MR. KRAFT: Your Honor, this is information
3 supplied--

4 THE COURT: There is only one thing to say. You
5 either object or consent.

6 MR. KRAFT: I object on the ground it is a lot
7 of raw engineering information. I do not see its relevancy
8 to this action.

9 THE COURT: What is the materiality of it at this
10 point?

11 MR. WEISSBERG: To show all the technical
12 expertise involved in designing and manufacturing the
13 system was supplied by Delta Data.

14 THE COURT: It will be received.

15 (Defendant's Exhibit M for identification
16 received in evidence.)

17

18

19

20

21

22

23

24

25

2 was delivered the multiterm was not programmed properly
3 and had to be taken back by Bob Burke to the factory to be
4 redesigned or to be fixed?

5 A Honestly, I never remember the multiterm box
6 ever coming back to the factory. I really don't know.

7 Q Do you have the service reports of service that
8 was performed by Delta Data for Graphic Scanning?

9 A I have some, yes.

10 Q Would you check to see if there is a report there
11 about the multiterm coming back to your factory.

12 THE COURT: Do you have anything like that so
13 we can save time?

14 MR. WEISSBERG: I don't have it.

15 MR. KRAFT: We have produced already --

16 THE COURT: Just produce the particular one. It
17 does not call for a speech. I tried to save time to
18 collapse a little bit of this time here. Is there any
19 such item?

20 MR. KRAFT: I don't know of any such document.

21 Q When the system was first set up did it work?

22 THE COURT: Whose system?

23 MR. WEISSBERG: The one they installed.

24 THE COURT: What they supplied or the whole thing
25 as conceived by the defendant?

1 the unit that was in Trenton. I had a man out there, and
2 then I had gotten a call back. There were five calls
3 where I sent a guy out. He fixed it five times like that,
4 no way.

5 Q You are talking about unit 1722. Is that the
6 one that was installed at Trenton?

7 A I don't know.

8 Q Do you have any records to show when the agree-
9 ment with Syntonic, the service organization, was in effect?

10 A Yes. I am sure back at the plant we do.

11 Q Do you recall during what period of time Syntonic
12 was doing your service work?

13 A Up until -- up until around last October,
14 November, somewhere around there.

15 Q During the period of May through October was
16 Syntonic servicing your equipment?

17 A They were servicing some of our equipment, yes,
18 sir.

19 Q Were they servicing the record-scanning equipment?

20 A No, sir. When I didn't have a man in the
21 house and when I felt I wanted to do something for Graphic
22 Scanning -- Graphic Scanning had a lot of special equip-
23 ment that we could not service out of Syntonic. Syntonic
24 only had a standard replacement board. While there were
25

1 A Yes.

2 Q In relation to the equipment that was purchased
3 under the March 27, 1972 order -- I come back to that --
4 would you say that, basically, you and Fred Crowley
5 designed that system?

6 A Designed?

7 Q Designed.

8 A We discussed it. We put it down on a piece of
9 paper. I said, "Fred, will that work?"

10 He said, "Yes. That will work."

11 If that is "designing" something, we designed it.

12 Q So you and he together planned and organized
13 and selected the components of the system that is in the
14 March 27th, 1972 purchase order?

15 A No.

16 Q Say it again.

17 A What we did was outline -- He knew basically
18 all Delta Data equipment. I didn't know the terminology.
19 I knew what Delta Data equipment could do. He had an
20 expertise in Delta Data. If he had worked for another
21 company he would have had expertise in that area. Out of
22 logic he designed a system with Delta Data equipment in
23 it because he sold it.

24 He sat down and I said, "This is what we want."

He said, "Fine. Let me work on it."

He worked on the system, outlined it, and put it
e of paper.

I said, "Does that work?"

He said, "This will do this and that will do

I said, "Fine. Great."

9 Q That was while he was part of the management of
10 Graphic Scanning Corporation?

A This is going back to November-December of 1972.

12 THE COURT: So that the two of you did plan to
13 use this equipment that he selected; is that right?

14 THE WITNESS: To implement the design, if you
15 will.

16 THE COURT: He selected the equipment; is that
17 right?

18 THE WITNESS: I don't know if he could select
19 equipment.

THE COURT: Who selected it if you and he didn't?

21 THE WITNESS: Delta Data and Graphic Scanning
22 sitting together would select the equipment.

20 THE COURT: Didn't you just get through saying a
21 moment ago that you and Crowley went over what Crowley had
22 selected, and that since Crowley was familiar with the

1 components made by Delta Data he added those components
2 into the system that you and he discussed and approved?

3 Isn't that what you just got through saying?

4 THE WITNESS: If I said that, yes.

5 THE COURT: Is it true?

6 THE WITNESS: It could be a situation where he
7 had been discussing this with Delta Data all along.

8 THE COURT: I'm not asking you to document your
9 reasoning. I am asking you whether it is true that he
10 and you planned this, and he and you planned it around
11 what he had organized and selected as the pieces that fit
12 into this system?

13 THE WITNESS: That would be about the truth,
14 yes.

15 BY MR. KRAFT:

16 Q In fact, Mr. Wynne, at page 63 of your deposi-
17 tion, your sworn testimony on August 28, 1973, in this
18 case was:

19 "I had spoken with Fred Crowley for the six months
20 prior to his leaving. We sat down and we designed the
21 system together."

22 That was your testimony?

23 A Yes.

24 Q It is true, is it not?

2 A Designed? I don't know if we can say "designed"

3 Q Isn't that what you said?

4 A Of course I said it.

5 THE COURT: That was page 69?

6 MR. KRAFT: Yes, your Honor.

7 Q Did you discuss with Mr. McEntee at any time
8 entry by Graphic Scanning into a service agreement with
9 Delta Data?

10 A I'm sure we discussed it, yes.

11 Q In fact, didn't Mr. McEntee recommend to you
12 that you enter into a service agreement?

13 A That I can't recall.

14 Q Incidentally, let's come back to Mr. Shienfeld
15 for a moment. What was Mr. Shienfeld hired to do for
16 Graphic Scanning?

17 A We hoped that he had the technical capability
18 to learn certain pieces of equipment after we had sent him
19 to school for that piece of equipment and possibly remedy
20 some of the problems that we were having without having to
21 wait for service, and we would have our own technical
22 person, as some companies do have, to remedy the problem
23 without having to wait for outside service.

24 Q When was Mr. Shienfeld hired? Late August or
25 the middle of August of 1972?

1 [276] Wynne-cross

2 that is in the summer of 1972, when, for the first time,
3 did Graphic Scanning render any services to a trucking
4 customer during that summer?

5 A June 6th, 7th or 8th -- in that area.

6 Q What kind of service was that?

7 A Permit service.

8 Q How about the dial-a-check service? When was
9 that rendered to a customer for the first time?

10 A July 7th of that same year.

11 Q Of 1972?

12 A Yes.

13 Q In fact, Mr. Wynne, prior to September 1st, 1972,
14 Graphic Scanning developed about 70 customers or so in its
15 trucking industry business?

16 A About that.

17 Q And serviced those customers with Delta Data
18 equipment; isn't that correct?

19 A That was the only equipment that we had at that
20 time, yes.

21 MR. KRAFT: No further questions, your Honor.

22 THE COURT: Is there any redirect examination?

23 MR. WEISSBERG: Yes, your Honor.

24 MR. KRAFT: Your Honor, I may have something
25 further subject to the production of those two documents

1 [308] Fenning-direct

2 THE COURT: That objection is overruled. He can
3 look at anything. He could look at the ceiling if he wants
4 to. That's not in evidence either.

5 A I have seen some of these and not all.

6 MR. WEISSEBERG: Your Honor, these documents were
7 produced pursuant --

8 THE COURT: No speeches.

9 MR. WEISSEBERG: I would like to offer these in
10 evidence.

11 MR. KRAFT: May I inquire of counsel whether
12 these are documents that we furnished from our file?

13 MR. WEISSEBERG: That's right.

14 MR. KRAFT: No objection.

15 (Defendant's Exhibit L received in evidence.)

16 Q Look at this document and tell me whether or not
17 you can tell when there was a repair to the multiterm
18 which was furnished to Graphic Scanning, Delta Data's
19 multiterm?

20 A I don't see anything on here.

21 Q Do you recall, of your own recollection, whether
22 or not the telterm stopped functioning in July?

23 A Yes.

24 Q Do you know, of your own knowledge, that the
25 multiterm stopped functioning in July?

1 [349] McEntee-direct

2 A Yes, sir. We notified Tom Wynne that delivery
3 would slip to May 15th because of the changes in the order.

4 Q Did you have any conversations with any representa-
5 tive of Graphic Scanning either prior to the placing of
6 the March 27th purchase order or thereafter in which they
7 indicated to you the length of time that they intended to
8 use the equipment?

9 A Yes, sir.

10 Q With whom did you have that conversation?

11 A Mr. Tom Wynne and Mr. Fred Crowley.

12 Q When was that conversation?

13 A During the negotiation for the order, early in
14 March, when I was visiting Graphic Scanning and talking to
15 them on the phone regarding what this equipment was going
16 to be and what it was going to do.

17 Q What did they say about their intentions with
18 respect to the time during which they would use the order?

19 A It was obvious to everybody that the --

20 MR. WEISSBERG: Objection, your Honor.

21 THE COURT: You cannot say that it was obvious.

22 Q What they said to you and what you said to them.

23 A They told me that the equipment should only last
24 for -- would only be used for six to nine months, because
25 because it would have to be replaced by more sophisticated

1 [350] McEntee-direct

2 equipment.

3 Q Did they relate this to the operation of their
4 new trucking business?

5 A Yes.

6 Q In what way did they relate it to the operation
7 of their new trucking business?8 A The number of terminals they would have in the
9 field, that the equipment we were supplying would not
10 support it and therefore would be required to have a much
11 more sophisticated system to handle a lot of terminals in
12 the field.13 Q When they reached a greater state of growth in
14 their business?

15 A That's correct.

16 Q Mr. McEntee, I would like to show you Defendant's
17 Exhibit G.18 MR. KRAFT: For the record, this consists of
19 the service invoices and related service reports on the
20 equipment sold by Delta Data to Graphic Scanning.21 Q Would you please examine the service reports
22 attached to the invoices and tell me whether you have an
23 opinion as to the normalcy of the service problems
24 encountered by Graphic Scanning in relation to this
25 equipment.

1 [373] McEntee-cross

2 Q Isn't it a fact that the service records for
3 these terminals is far less than the service required on
4 the new terminals?

5 A I don't know, sir. I don't have any records.

6 Q Do you have records of this?

7 A I don't here. I don't have any records here.

8 Q You do have records as to how many service calls
9 were made for the --

10 A I don't know whether the new service manager
11 kept records. I have been out of service for a while.
12 They have gone through three managers there.

13 Q You don't know whether the records are available?

14 A No.

15 Q Do you recall receiving anywhere near the number
16 of telephone calls after the first terminals were installed
17 as compared to the second? .

18 A No, sir. Mr. Crowley was very good at going
19 in and when he had a problem isolating it down to what it
20 was, and he would call me and tell me what he needed and
21 I would send it to him.

22 Q You sent it to him from your New York office
23 at that time, didn't you?

24 A No, sir. I didn't have a New York office.. I
25 had a Rutherford office. Syntonic Corporation was working

1 [381] Mattson

2 "MR. KRAFT: I am to understand then, Mr.
3 Wolkowitz, that with the exception of a letter of July
4 18, 1972 from Graphic Scanning to Delta Data, which was
5 previously marked as Plaintiff's Exhibit No. 7 on the
6 examination of Graphic Scanning on August 28, 1973, there
7 is no writing in the files of Graphic Scanning between
8 Graphic Scanning and Delta Data in which Graphic expresses
9 any complaints about the equipment sold to it by Delta
10 Data?

11 "MR. WOLKOWITZ: It is correct to say that a
12 search of the files has failed to reveal any such documents.

13 "MR. KRAFT: And does counsel know of the exist-
14 ence of any such documents?

15 "MR. WOLKOWITZ. No.

16 "Q. Do you know of any such documents, Mr. Mattson?

17 "A. No, sir, not to my knowledge."

18 Incidentally, with relation to the letter of
19 July 18, 1972, that letter that was referred to in that
20 deposition has now been marked as Defendant's Exhibit K.
21 We will come to that later on. I just wanted the record
22 to reveal that that is a letter that is referred to.

23 Now we turn to page 231, line 15:

24 "Q. I see. So the last date of his actual employ-
25 ment" (and here we are referring to Fred Crowley) "when

1 [408] SUMMATION OF DELTA DATA

2 Please remember that we, Delta Data, brought this
3 case in this court to have you, the jury, decide that
4 Graphic Scanning owed Delta Data the sum of \$34,272.81
5 with interest from November 1st, 1972. That's what this
6 case is all about.

7 We have a defendant who has I-don't-know how
8 many reasons why he should not pay that money, but I
9 submit to you that the defendant has too many reasons and
10 none of them are any good. The evidence shows that they
11 are not any good.

12 In deciding the case I am not going to tell you
13 my opinion about why somebody did thus and so or ask you
14 to speculate on why anybody did anything, because your
15 verdict, as jurors, is required to be based on the evidence,
16 and the evidence alone, and you are required by the law
17 to apply the instructions which his Honor will give you
18 about the law. You are to apply the evidence to the law.
19 If you do that I think you will have an easy time of
20 deciding how to do justice in this case, because that's
21 what we seek. We seek a just verdict.

22 Let's talk about the evidence.

23 This is a simple case. I hope you will not allow
24 the defendant to complicate a case which is about somebody
25 who didn't pay a bill. That's all the case is about,

1 [423] SUMMATION OF DELTA DATA

2 want to pay us. Is that fair? They used our equipment;
3 they started a business, the trucking business.

4 Wynne testified that they built up from 75
5 customers. They had 75 trucking customers to use their
6 services while they were using our equipment before
7 September 2nd. Wynne admitted they had 75 customers.
8 Now they have 200. They have a more complicated system.
9 They have built up a successful business which they started
10 with Delta equipment and they don't want to pay for our
11 equipment.

12 If there is anything more to this case it
13 escapes me, ladies and gentlemen of the jury. It escapes
14 me. I have tried to hit the highlights. I may not have
15 covered every point of the evidence and I don't intend to
16 take the time of his Honor and you, ladies and gentlemen.
17 I said I would take a short time to discuss the case with
18 you and that short time is coming to a conclusion.

19 The fact is when all is said and done I say that
20 this is a simple case. You know what this case is all about.
21 This case is about Exhibit 8. It is a statement from Delta
22 Data to Graphic Scanning. It is a statement that says at
23 the bottom that Graphic Scanning owes to Delta Data the
24 sum of \$34,275.81 with interest computed as shown at the
25 bottom from November 21, 1972. That is what this case is

1 [423a] SUMMATION OF DELTA DATA

2 all about, ladies and gentlemen of the jury.

3 I ask you to submit your verdict in that amount
4 and nothing less than that amount. That's what we have
5 proven, and I say to you on behalf of the plaintiff that
6 if you render that verdict, that verdict will do justice
7 in this case.

8 Thank you very much.

9 ---

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 [428] CHARGE

2 depositions have been read to you as they have in this case,
3 whether his interest is such that he is likely, intentionally
4 or otherwise, to color his testimony.

5 You are at liberty, if you deem it proper under
6 all of the circumstances, to disbelieve his testimony even
7 though it is not otherwise impeached or contradicted. However,
8 you are not required to disbelieve such a witness and may
9 accept if you choose all or such part of his testimony as you
10 deem reliable and reject such parts as you deem unworthy of
11 acceptance. You will recall that portions of depositions of
12 certain of the witnesses were read to you. A deposition con-
13 tains testimony elicited under oath prior to commencement of
14 the action and may be considered as part of the evidence in
15 the case.

16 When a party has the burden of proof on a par-
17 ticular issue that means that considering all the evidence in
18 the case the contention of that party on that issue must be
19 established by a fair preponderance of the credible evidence.
20 The credible evidence means the **testimony** or exhibits that
21 you the jury find worthy to be believed. A preponderance
22 means the greater part of it. That does not mean the greater
23 number of witnesses or the greater length of time that either
24 side employs. The phrase refers to the quality of evidence,
25 the weight and the effect that it has on your mind. The law

1 [442] CHARGE

2 will be for the plaintiff; but if the fair preponderance of
3 the evidence indicates that such notice of intention was given
4 your verdict will be for the defendant.

5 The only verdict for money damages that can be
6 awarded in this case is in favor of the plaintiff. If your
7 verdict is for defendant, it may not award any damages to the
8 defendant since there are no counterclaims of the defendant
9 for you to decide in this case.

10 I have not attempted and it is not necessary for
11 me to go into all of the evidentiary claims. The case has
12 been reasonably short and your recollection will suffice and
13 control in all respects in any event. It is for you to de-
14 cide what are the facts.

15 In reaching your verdict you are not to be af-
16 fected by sympathy for any of the parties or what the reaction
17 of the parties to what your verdict may be, whether it pleases
18 or displeases anyone or whether it will be popular or unpopular
19 or, indeed, any consideration outside the case as it has been
20 presented to you in this court room.

21 In order to return a verdict it is necessary for
22 each juror here to agree thereto. Your verdict must be unan-
23 imous.

24 In reporting your verdict to the court you will
25 state either that it is in favor of the defendant or in favor

PLAINTIFF'S EXHIBIT 1--
PURCHASE ORDER DATED 3/27/72

PURCHASE ORDER					
ITEM		DATE 3/27/72		DATE REQUIRED 30 days	
QUANTITY	STOCK NUMBER/DESCRIPTION	UNIT	PRICE	PER	TERMS
1	Multi-Function Multiplexer with 8 to 5 Level Conversion Feature	EA	6200.00	6,200.00	SHIP TO: Graphic Scanning Corp ATT: F.C. Crowley 11 Broadway New York, N.Y. 10004
1	TAPE - ASSENTE with BUFFER	EA	3,800.00	3,800.00	SHIP VIA F.O.B.
1	High Speed Sheet Paper Tape Punch	EA	5,150.00	5,150.00	
4	Terminals modified with dual RS 232 interface for access to a high speed printer	EA	4,230.00	16,920.00	
TOTAL				37,070.00	
ITEMS PAID FOR PAYMENT					
DUPLICATE					

PLAINTIFF'S EXHIBIT 5--
 STATEMENT DATED AUGUST 1, 1972
 TO GRAPHIC SCANNING

STATEMENT

BOX 298
 CORNWELL HEIGHTS, PA 19020

DEC 3 - 1973

DATE August 1, 1972

TO

Graphic Scanning Corp.
 141 Broadway
 New York, New York

Statement as of July 30, 1972

INVOICE NUMBER	DATE	CUSTOMERS PURCHASE ORDER NUMBER	AMOUNT
426-1	5-2-72		\$ 37.00
426-1	5-15-72		4,490.00
426-2	5-19-72		21,640.00
426-2	5-26-72		4,210.00
426-3	5-29-72		2,450.00
426-4	7-14-72		10,420.00
		If there is any reason...	ANY PAYMENT ON THIS PAST DUE ACCOUNT HAS NOT BEEN MADE. PLEASE FURNISH FOLIO PLEASE MAIL REMITTANCE TODAY!!
NET DUE AMOUNTS	30.00	60.90	80-OVER
			CURRENT
			TOTAL BALANCE DUE
			\$48,972.00

RECEIVED

BOX 298 CORNWELL HEIGHTS PENNA 19020

TERMS ARE 1% M. Net 30 1 1/2% per month interest will be added to
 all overdue accounts

PLAINTIFF'S EXHIBIT 6--
 CHECK OF GRAPHIC SCANNING
 DATED AUGUST 18, 1972

GRAPHIC SCANNING CORP.
 13 WEST 34TH STREET
 NEW YORK, N. Y. 10001

7274

PAY
TO THE
ORDER OF

Delta Data Corp. \$25,000.00

Aug 18 1972 1:57
 $10.72 \frac{1.57}{210}$

DOLLARS



IRVING TRUST COMPANY
 ONE WALL STREET, NEW YORK, N. Y. 10004
 A Charter New York Bank

Burg gal

010210-00670 01 152 0067

*Plaintiff
P. 8/20/73
ctr*

*Alt 4 #21
6.1
11-13-73
un-*

PLAINTIFF'S

EXHIBIT

U. S. Dist. Court
 S. D. of N. Y.

6
 DEC 3 - 1973

PLAINTIFF'S EXHIBIT 8--
 STATEMENT TO GRAPHIC SCANNING
 DATED NOVEMBER 21, 1972

STATEMENT

EXHIBIT

U. S. Dist. Court
S. D. of N. Y.8
DEC 3 1972BOX 298
CORNWELLS HEIGHTS, PA. 19020DATE November 21, 1972

TO Graphic Scanning Corporation
11 Broadway
New York, New York 10004

Current Statement of Account

INVOICE NUMBER	DATE	CUSTOMERS PURCHASE ORDER NUMBER	AMOUNT
450-1	5-15-72	Balance on Invoice	\$ 3,567.00
426-2	5-18-72		4,230.00
426-3	5-26-72		2,450.00
545-1	6-23-72		13,725.00
549-1	7-30-72		4,575.00
567-1	9-19-72		4,575.00
50600-1	10-17-72		105.00
PAST DUE AMOUNTS		30-60 60-90 90-OVER CURRENT	TOTAL BALANCE DUE

PLEASE REMIT TO

BOX 298, CORNWELLS HEIGHTS, PENNA. 19020

TERMS ARE 2% MO. INTEREST, NET 30. 1% per month interest will be added to
all overdue accounts.

128
PLAINTIFF'S EXHIBIT 8--
STATEMENT TO GRAPHIC SCANNING
DATED NOVEMBER 21, 1972

STATEMENT



**Delta
Data
Systems**
Corporation

BOX 298
CORNWELLS HEIGHTS, PA 19020

DATE November 21, 1972

TO: Graphic Scanning Corporation
11 Broadway
New York, New York 10004

INVOICE NUMBER	DATE	CUSTOMER'S PURCHASE ORDER NUMBER			AMOUNT
50601-1	10-17-72				\$ 130.00
50603-1	10-17-72				205.00
50608-1	10-17-72				355.32
50614-1	10-17-72				358.49
PAST DUE AMOUNTS		30-60	60-90	90-OVER	TOTAL BALANCE DUE
		4,575.00		28,547.00 1,153.81	\$ 34,275.81

PLEASE REMIT TO:
BOX 298, CORNWELLS HEIGHTS, PENNA. 19020

TERMS ARE 1% - 10. Net 30. 1 1/2% per month interest will be added to
all overdue accounts.

PLAINTIFF'S EXHIBIT 11--
STATEMENT FROM DELTA DATA TO
BARRY YAMPOL DATED SEPTEMBER
26, 1972



**Delta
Data
Systems**
Corporation

26 September 1972

Mr. Barry Yampol
President
Graphic Scanning Corp.
11 Broadway
New York, New York 10004

Dear Mr. Yampol:

Enclosed is a copy of the statement for your account which is, as you know, overdue. In our previous discussions, we indicated that we would provide you with the level of service support you required to conduct your business. We have been fulfilling our part of the obligation, although we have still not received from you a purchase order for the appropriate service contracts.

We require a payment of the balance of your account, \$28,547.00, on or about October 2, 1972 in order to be able to continue to support your account. This is consistent with our agreement in August for payment of our account in installments while providing you with a level support you specified. As part of that, you intended to purchase additional terminals which you have now served notice upon us that you are cancelling.

I trust that we can resolve this final payment promptly to assure an uninterrupted flow of service of your equipment.

Very truly yours,

DELTA DATA SYSTEMS CORPORATION

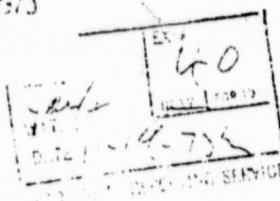
R. Barry Borden
President

RBB/pp
Enclosure
cc: H. Barry Maser ✓

EXHIBIT
U. S. Dist. Court
S. D. of N. Y.

12 12
12 200 8 - 1973

130
PLAINTIFF'S EXHIBIT 12--
LETTER FROM DELTA DATA TO BARRY
YAMPOL DATED OCTOBER 17, 1972



Delta
Data
Systems
Corporation

17 October 1972

Mr. Barry Yampol
President
GRAPHIC SCANNING CORP.
11 Broadway
New York, New York 10004

Dear Mr. Yampol:

I have not received any correspondence or funds from you relative to my previous letters. This is to advise you that I have asked the Service Department to put a hold on further service calls until such time as we receive a check to clear up our account. I would also like to point out that we still do not have service contracts on your machines. In order to provide the type of service you would like, we have to have this. We are both in business to sell our goods and services and cannot operate without our bills being paid.

I trust that you will take prompt action on this matter so that we can provide you with continuing service for your terminals.

Very truly yours,

DELTA DATA SYSTEMS CORPORATION

R. Barry Borden
President

RBB/PP
cc: H. Barry Maser ✓
G. Dulleavy

EXHIBIT

U. S. Dist. Court
S. D. of N. Y.

14-
EX-4-1973

131

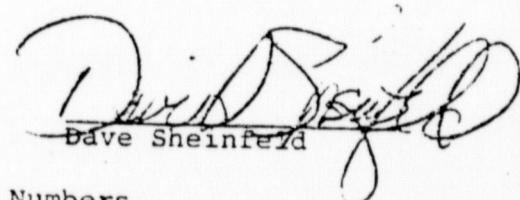
PLAINTIFF'S EXHIBIT 14--
CUSTOMER EQUIPMENT ACCEPTANCE
DATED 8/28/72

Delta
Data
Systems
Corporation

Date 8/28/72

CUSTOMER EQUIPMENT ACCEPTANCE

This is to certify that the representative of the Graphic Scanning Corporation named below did on the above date accept the listed equipment. It is also stated that this acceptance constitutes the compliance of DELTA DATA SYSTEMS CORPORATION with the requirement of Graphic Scanning Corporation and the listed equipment was found to be both operational and in satisfactory condition.


Dave Sheinfeld

DELTA 5200 Video Display Serial Numbers.

G02162	G02159
G02163	G02155
G02165	G02158
G02162	G02156

PLAINTIFF'S EXHIBIT 20--
COMPONENTS OF GRAPHIC'S REPLACEMENT SYSTEM

Components of replacement system for Delta Data System provided to Graphic Scanning Corp. for its Trucking Network.

1. Pixeltine 2000 - Modified to transmit both background and foreground text.
2. Itel Tape Converter - Convert 8 Aski to 5 Baudot and 5 Baudot to 8 Aski.
3. Contention Box,- Designed and built by Wells TP Sciences, a wholly owned subsidiary of Graphic Scanning Corp.
4. IBM 1130 for speed and code conversion.
5. 2310 & 2311 IBM Storage Discs

DEFENDANT'S EXHIBIT K--
LETTER FROM GRAPHIC SCANNING TO
BARRY BORDEN DATED July 18, 1972

July 18, 1972

Mr. Barry Borden
President
Delta Data
Woodhaven Industrial Park
Cornwells Heights, Pennsylvania 19020

Dear Barry:

This letter will confirm our meeting of last week regarding past and present equipment requirements.

As we discussed, we have had delivery problems which have placed us in precarious position with our customer. However, I feel we have solved some of these problems and we will keep you abreast of future need, so as not to conflict with either of our delivery schedules.

At present, we have requirements for sixteen (16) tel-terms within the next six weeks. These sixteen (16) are reduced by five (5) since we presently have two units at G.S.C. New York, and three units awaiting delivery at your plant. Consequently, our need is eleven (11) additional units within the next six weeks. We do have an order outstanding for five (5) (which was an initial order of (9) nine). This leaves us with an additional six (6) units. We would like to release these six from our original order of thirty (30), to be delivered within the next six weeks.

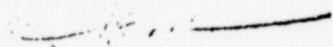
An additional ten (10) units should be held for delivery to the State of New York. This is imperative since we have a due date of September 4th for all eleven (11) districts in New York.

Barry, it is my hope that some of the problems we have had in the past will be forgotten, and that we can work together to achieve an optimum working relationship.

If you have any questions, please feel free to call me.

Sincerely,

GRAPHIC SCANNING CORPORATION


Thomas J. Wynne

INDEX TO THE RECORD ON APPEALUNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
 BELL A DATA SYSTEMS CORPORATION, : UNITED STATES DISTRICT
 Plaintiff, : COURT FOR THE SOUTHERN
 : DISTRICT OF NEW YORK,
 : CASE NO. 73 Civ. 1110
 : Judge Pollack
 -against- :
 GRAPHIC SCANNING CORP., :
 Defendant. :
 -----X

<u>INDEX TO THE RECORD ON APPEAL</u>	<u>DOCUMENTS</u>
Certified copy of docket entries	A-C
Complaint	1
Summons with Marshal's ret.	2
Stipulation extending time to answer	3
Answer and counterclaims—	4
Plaintiff's demand for jury trial	5
Stipulation extending time to reply to counterclaim	6
Defendant's request for production of documents—	7
Plaintiff's interrogatories—	8
Plaintiff's request for discovery and inspection—	9
Plaintiff's affidavit and notice of motion re inspection and memo end. dtd. 9/26/73	10
Plaintiff's memorandum of law in support of motion	11
Plaintiff's notice to depose T. Wynne	12
Stipulation and order withdrawing portion of counterclaim	13
Notice of appearance and change of address-defendant	14
Defendant's notice of motion and affidavit	15
Plaintiff's affidavit in opposition to motion	16
Plaintiff's reply to counterclaims	17
Judgment # 73,963	18
Bill of costs	19
Supersedeas bond	20
Defendant's notice of appeal	21
Transcript of proceedings 11/20/73	22
Clerk's certificate	23

INDEX TO SUPPLEMENTAL RECORD ON APPEAL

Certified extract of docket entries	24
Stipulation:	
Deposition of defendant by E. Fenning	25
Deposition of defendant by B. Yampol	26
Defendant's answers to interrogatories	27
Defendant's notice to take deposition	28
Defendant's second request for production of documents	29
Defendant's further answers to interrogatories	30
Stenographer's minutes of trial	31
Clerk's certificate	32
Stipulation to transmit copy of paper (notice to produce)	33
Clerk's certificate	34

Service of Three (3) copies of the within Joint Appendix
is admitted this 5th day of June 1974

Melvin D. Roth
Appellee